91-1263

NO.

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David P. Jaqua
Kullman, Inman, Bee, Downing & Banta
5100 Poplar, Suite 1410
Memphis, TN 38137
Telephone: (901) 763-1771
Counsel of Record
for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

19

QUESTIONS PRESENTED FOR REVIEW

1. Should a bargaining order of the National Labor Relations Board be unconditionally enforced without regard to employee sentiment in cases of gross Board-occasioned delay?

2. Does Section 10(b) of the National Labor Relations Act — the six-month statute of limitations governing the General Counsel's issuance of unfair labor practice complaints — prohibit an employer from withdrawing recognition of a union based on evidence of facts occurring more than six months earlier?

3. Where a supervisor who is a bargaining unit member has lawfully participated in circulating a decertification petition among fellow bargaining unit members, does the employer's statements to the bargaining unit members subsequent to the filing of the petition with the Board "ratify" the member-supervisor's prior statements so as to "taint" the petition and prevent a decertification election?

TABLE OF CONTENTS[1]

Page

I. Questions Presented for Review i

II. Table of Contents ii

III. Table of Authorities iv

IV. List of Official and Unofficial Reports Below 1

V. Statement of Jurisdictional Grounds 1

VI. Statutes Involved in the Case 1

VII. Statement of the Case 2

VIII. Basis of Federal Jurisdiction Below 4

IX. Argument 5

A. A writ should be granted to consider the issue raised by the Board's gross delay because the Court of Appeals' decision creates a conflict between the circuits and involves an important federal question of law which has not been but should be decided by this Court 5

1. Conflict between the circuits 5

2. Important federal question 7

---

[1] All parties appear in the caption of the case. There are no other corporations to be listed.

TABLE OF CONTENTS (continued)

Page

B. A writ should be granted to consider the application of Section 10(b) of the National Labor Relations Act to this case because the Board's and the Court of Appeals' application of that statute conflicts with a decision of this Court 10

C. A writ should be granted on the "ratification" issue because it involves an important question of federal law which has not been but should be decided by this Court 11

D. Conclusion 13

X. Appendix

A. Decision of the Administrative Law Judge dated May 4, 1984 . . . . . A-1

B. Decision of the National Labor Relations Board dated May 31, 1989 . . . . . A-176

C. Order and Opinion of the Court of Appeals dated August 23, 1991 . . . . . A-229

D. Order of the Court of Appeals denying rehearing dated November 1, 1991 . . . . . A-243

TABLE OF AUTHORITIES

CASES **Page**

Consolidated Freightways v. NLRB, 892 F.2d 1052, (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 59, 112 L.Ed.2d 34 (1990) 9

Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984) 6,9

Local Lodge No. 1524, International Association of Machinists, AFL-CIO v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411, 80 S. Ct. 822, 4 L.Ed.2d 832 (1960) 10,11

Montgomery Ward & Co., 115 NLRB 645 (1956), *enf'd.* 242 F.2d 497 (2d Cir.) *cert. denied*, 355 U.S. 829 (1957) 2,11,12

NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, 466 U.S. 720 (1984) (per curium) 7

NLRB v. Link-Belt Co., 311 U.S. 584, 61 S. Ct. 358, 85 L.Ed.2d 368 (1941) 12

NLRB v. J. H. Rutter-Rex Mfg. Co., 369 U.S. 258, 90 S. Ct. 417, 24 L.Ed.2d 405 (1969) 7,8

Ollivetti Office USA, Inc. v. NLRB, 926 F.2d 181 (2d Cir.), *cert. denied*, 112 S. Ct. 168, 116 L.Ed.2d 132 (1991) 9

Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991) 6,9

TABLE OF AUTHORITIES (continued)

Page

STATUTES

28 U.S.C. §1254(1) 1

NLRA §§2, 5-7, 29 U.S.C. §§152(5)-(7) 4

NLRA §8(a)(5), 29 U.S.C. §158(a)(5) 1,4

NLRA §10(b), 29 U.S.C. §160(b) 2,4,5,10,11

NLRA §10(f), 29 U.S.C. §160(f) 5

OTHER

House Committee on Government Operations, *Delay, Slowness in Decision Making, and the Case Backlog of the NLRB*, H. R. Rep. No. 1141, 98 Cong., 2nd Sess. 16 (1984) 8

Selected Statements on Delays in NLRB Case Handling, 193 Daily Labor Report (Bureau of National Affairs) D-1, 5 (October 3, 1990) 9

LIST OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The decision of the National Labor Relations Board in this case is reported at 294 NLRB No. 6 and at 138 LRRM 2160. The decision of the Court of Appeals is an unpublished decision listed at 943 F.2d 52 (Table) and at 138 LRRM 2160 (Table). The order of the Sixth Circuit denying rehearing has not been reported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on August 23, 1991, and the order of the Court of Appeals denying rehearing was entered on November 1, 1991. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

Involved in this case are the following statutory provisions found in Sections 8(a)(5) and 10(b) of the National Labor Relations Act:

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.

29 U.S.C. §158(a)(5).

> [N]o complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed

> forces, in which event the six-month period shall be computed from the day of his discharge.

29 U.S.C. §160(b).

STATEMENT OF THE CASE

Each of the Petitioners independently operates one or more retail grocery stores in the Memphis, Tennessee area. Prior to February of 1982, Petitioners' meat department employees were represented by Local 452 of the United Food and Commercial Workers Union which had been Meatcutters District Union 452. In February of 1982 a merger election was held, allegedly resulting in the merger of Local 452 into the much larger Local 1529 of the United Food and Commercial Workers Union. Petitioners received notice of this alleged merger in a letter from the union dated April 7, 1982. Initially, Petitioners had no reason to question the validity of the merger election and therefore continued to abide by the existing collective bargaining agreement with Local 452.

Sometime later that summer, bargaining unit employees of Petitioner Baker Bros. began circulating a decertification petition. Amongst the supporters of decertification were members of a bargaining unit who held head meatcutter positions. These individuals encouraged their fellow bargaining unit members to sign the petition.[2] The

---

[2] The Board determined that the head meatcutters were statutory supervisors, but did not find that their support of the decertification petition had been unlawful at the time their actions were taken under the doctrine of *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956) (when a supervisor is a member of the union, then the employer is not responsible for his or her encouragement of an anti-union petition unless the employer encouraged, authorized, or ratified the supervisor's acts or statements).

decertification petition was filed with the Board on August 9, 1982. Subsequent to that date, a management representative of Baker Bros. met with the meat department employees and told them he had been notified by the Board that a petition for a decertification election had been filed, that it was his understanding that the majority of employees had signed the petition, and that he appreciated their confidence.[3]

In the fall of 1982, Petitioners learned of facts concerning the merger election between Locals 452 and 1529 which indicated the merger was defective and invalid because, among other things, due process safeguards for the protection of employee free choice had been disregarded.[4] Each of the Petitioners then withdrew recognition from Local 1529, stating that in each Petitioner's view the union did not represent the employees whom Local 452 had previously represented.

Following their withdrawal of recognition, unfair labor practice charges were filed against Petitioners. A hearing before an administrative law judge (ALJ) was completed on April 11, 1983, and the ALJ's decision rendered on May 4, 1984. Exceptions were promptly filed with the Board. However, the Board failed to issue its decision and order for over five years. On May 31, 1989 — nearly seven

---

[3] The Board held that these statements — perfectly lawful on their face — constituted a "ratification" of the head meatcutters' prior alleged statements in support of the decertification, thereby tainting the petition and precluding a decertification election.

[4] Evidence concerning the invalidity of the merger was presented to the Board, but the Board never considered this evidence or the issue of whether the merger election was invalid, instead holding that Section 10(b) of the Act precluded consideration of that evidence because more than six months had passed since the merger.

years after the events leading to Petitioners' withdrawal of recognition from the union — the Board rendered a decision ordering Petitioners to bargain with Local 1529.[5]

The Board found that each of the Petitioners violated Section 8(a)(5) of the Act when it withdrew recognition from the union. As previously noted, the Board concluded that evidence that the merger election was defective could not be considered because the merger occurred more than six months prior to each Petitioner's withdrawal of recognition. The Board reasoned that consideration of the validity of the merger was barred by Section 10(b) of the Act, and that even if the merger was defective and invalid, Petitioners were thus time-barred from using that fact as a basis for withdrawing recognition.

Additionally, the Board held that the decertification petition filed by employees of Baker Bros. was tainted. This ruling was premised on the Board's conclusion that the statements of a manager, *after the decertification petition had been filed* with the Board, "ratified" the head meatcutters' earlier actions in support of decertification and *retroactively* "tainted" the petition.

BASIS OF FEDERAL JURISDICTION BELOW

The Board assumed jurisdiction of this matter upon a finding that Petitioners are employers engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and that Local 1529 is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. §§152(5)-(7). The Court of Appeals had jurisdiction pursuant to Section

---

[5] The Board gave no consideration to the question of whether the employees now desire to have a union represent them when there has been no contact with that union for all these years.

10(f) of the Act, 29 U.S.C. §160(f) upon petition for review of the Board's order and on cross-application of the Board for enforcement of its order.

ARGUMENT

A. ***A writ should be granted to consider the issue raised by the Board's gross delay because the Court of Appeals' decision creates a conflict between the circuits and involves an important federal question of law which has not been but should be decided by this court.***

1. *Conflict Between the Circuits*

In the instant case, the withdrawal of recognition from Local 1529 occurred in 1982, and the case was tried before an ALJ in 1983. The Board did not issue its decision until May of 1989, almost seven years after the occurrence of the underlying facts. No reason or explanation was offered for this gross delay. The Board now forces Petitioners to bargain with Local 1529. The problem with this bargaining order is that the bargaining unit employees have had no contact with this or any other union since 1982. Moreover, the vast majority of the present meat market employees were not even employed in 1982.[6] The Board's order, if enforced, clearly will have the effect of requiring an employer to bargain with a union where there is no reason to believe the union is supported by a majority of employees in the bargaining unit.

The Court of Appeals' enforcement of the bargaining order in this case places the Sixth Circuit Court of Appeals in conflict with other circuits. The Fifth and Seventh

---

[6] This fact was presented to and accepted for consideration by the Court of Appeals

Circuits have held that a bargaining order cannot be enforced after gross Board-occasioned delay where there is little or no reason to suppose the union has majority support after so great a length of time.

In *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991), the employer withdrew recognition in July 1984 from a union based upon its belief that the employees no longer wanted union representation. An ALJ heard unfair labor practice charges brought by the union challenging the withdrawal in October 1984 and issued his decision in February 1985. Exceptions were timely filed but the Board did not issue its decision and order until September 1989. The Board's order required the employer to resume bargaining with the union. The Fifth Circuit reviewing the Board order, stated:

> Without explanation for the delay, the NLRB took over four years after the ALJ had made his initial determination to issue a final order. While administrative delay is common and unfortunately expected, it must be taken into account. If delays are occasioned by an obstinate employer, he may not benefit from his own wrongs, and a bargaining order will be enforced. At the same time, a four year delay by the Board is unreasonable, and cannot be ignored in developing a remedy that protects employee rights.

Id. at 404 (citations omitted). Thus, rather than enforce the bargaining order without any concern being given to whether the employees wanted to be represented by the union, the court ordered that the Board determine employee sentiment through a Board-sponsored election.

The Seventh Circuit Court of Appeals in *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984),

denied enforcement of a Board bargaining order which was issued after several years of administrative delay. The court, noting that in the interim there had been significant employee turnover, reasoned that the employees should not be deemed to be represented by the union where there was no reason to believe the union in fact was supported by a majority of the current workers in the bargaining unit. The Board had only itself to blame for the gross delay which made enforcement of its order unfair and inappropriate.

The Sixth Circuit Court of Appeals' enforcement of the Board's bargaining order in the instant case cannot be squared with these decisions from other circuits. Petitioners respectfully suggest that this Court should grant a writ in order to resolve the conflict which now exists between the circuit courts of appeals.

2. *Important Federal Question*

Petitioners additionally suggest that the issue of what a court of appeals should do where it is asked to review a Board bargaining order after gross Board delay is an important and frequently recurring issue of federal law which should be decided by this Court. While this Court has previously considered the issue of inordinate Board delay in cases involving backpay orders,[7] it has never addressed the issue in a case involving a bargaining order. The two situations are very much different. In a case involving a backpay order, if enforcement is not granted, then the employees will clearly lose. If the backpay order is enforced, then the employer clearly suffers on account of

---

[7] *NLRB v. International Association of Bridge, Structural & Ornamental Iron workers, Local 480*, 466 U.S. 720 (1984) (per curium); *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 90 S. Ct. 417, 24 L.Ed.2d 405 (1969).

the Board's delay. Whichever route is taken, either the employees or the employer must inevitably pay a penalty as a result of the Board's delay.[8] The situation is different in a case involving a bargaining order because such a case does not place the parties in a no-win situation where one party inevitably must shoulder an unfair consequence because of the Board's own inordinate delay. Rather, there exists a simple alternative — requiring the Board to hold an election — which protects the legitimate rights of the employees, the union, and the employer.

If Board delay were a rare occurrence, then perhaps a less compelling argument could be made that the Court should consider this question. Unfortunately, however, the problem of Board delay has been and continues to be a common occurrence.

In 1984 the House Committee on Government Operations heard testimony concerning the increasingly apparent and disturbing problem of inordinate delay by the National Labor Relations Board in rendering decisions in cases before it. One commentator observed that, sadly, once a case is presented to the Board, "it appears to enter a new dimension — one where time has little meaning." House Committee on Government Operations, *Delay, Slowness in Decision Making, and the Case Backlog of the NLRB,* H.R. Rep. No. 1141, 98 Cong., 2nd Sess. 16 (1984). This commentator noted that the long delays that have come to be expected from the Board often force parties to wait years for a decision, a process that can be so frustrating that many have said they "would prefer to have the case decided immediately by the flip of a coin." *Id.* at 11.

---

[8] This Court has held that in such a case the wrongdoing employer, not the employees, must shoulder the consequences of the Board's delay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, supra.

The problem has not been resolved subsequent to those comments in 1984. Indeed, a recent General Accounting Office study revealed that, in the six year period ending in 1989, ten percent of cases before the Board took over three years to decide and some cases took more than seven years to decide. *Selected Statements on Delays in NLRB Case Handling*, 193 Daily Labor Report (Bureau of National Affairs) D-1, 5 (October 3, 1990). Chairman Tom Lantos of the Employment and Housing Subcommittee noted that some people when talking about a case going to the Board have "spoken about it in the same tone as if the case had gone to the Bermuda Triangle." *Id.* at 1.

The reality of the situation described by these government studies and commentators is forcefully demonstrated by numerous cases in which Board orders have been appealed to the courts of appeals due to the unfairness of Board-occasioned delay. The case *sub judice* in which the Board took over five years to render a decision after the ALJ's decision is only one example. *See also, e.g., Texas Petrochemicals Corp. v. NLRB, supra* (4 year delay); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 59, 112 L.Ed.2d 34 (1990) (six year delay); *Continental Web Press, Inc. v. NLRB, supra* (more than two year delay); *Ollivetti Office USA, Inc. v. NLRB*, 926 F.2d 181 (2d Cir.), *cert. denied*, 112 S. Ct. 168, 116 L.Ed.2d 132 (1991) (two year delay). These cases are but a few of the reported cases involving inordinate Board-occasioned delay and the question of whether a Board order should be enforced in light of the lengthy delay.

Because the problem of gross Board delay has been and continues to be a recurrent problem, and because the question of representation goes to the very heart of national labor policy under the National Labor Relations Act,

Petitioners respectfully suggest that the issue is one which warrants review by this Court.

B. *A writ should be granted to consider the application of Section 10(b) of the National Labor Relations Act in this case because the Board's and the Court of Appeals' application of that statute conflicts with a decision of this Court.*

Section 10(b) of the National Labor Relations Act prohibits the Board's General Counsel from issuing an unfair labor practice complaint with respect to events occurring more than six months prior to the filing of a charge. Section 10(b) is a statute of limitations. Nothing more. In the present case, however, the Board and the Court of Appeals have utilized a novel application of Section 10(b) to bar Petitioners from considering events which occurred more than six months prior to their withdrawal of recognition. This novel use of Section 10(b) distorts *Local Lodge No. 1524, International Association of Machinists, AFL-CIO v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416, 80 S. Ct. 822, 4 L.Ed.2d 832 (1960).

In *Bryan Mfg. Co.* this Court recognized that Section 10(b) is a statute of limitations which does not bar use of evidence of earlier events "to shed light on the true character of matters within the six month limitations period," *Id.* at 416-17, but does preclude use of evidence outside the six month period to "cloak with illegality that which was otherwise lawful." *Id.* The Court's opinion did not in any manner embrace the Board's now bizarre use of Section 10(b) as a bar to an employer's withdrawal of recognition. The Board's new application of Section 10(b) ignores the plain text of the statute: this section is simply a statute of limitations regulating the General Counsel's prosecution of unfair labor practice matters.

In the case *sub judice,* Petitioners introduced evidence that the merger election between Locals 452 and 1529 was defective and invalid — not to "cloak with illegality" and support a charge concerning anything Local 1529 did subsequent to that merger — but merely to show that Petitioners had lawful grounds to cease recognizing Local 1529 until majority support was properly demonstrated. If Local 1529 did not represent the employees, then the Petitioners could rightly refuse to bargain with that union.

Because the novel use of Section 10(b) by the Board and by the Sixth Circuit Court of Appeals in this case conflicts with *Bryan Mfg. Co.* and disregards the plain text of the statute, a writ should be granted. Petitioners respectfully suggest that the issue of representation is not subject to the Section 10(b) *unfair labor practices* period. An employer should not be required to continue bargaining with a union when facts come to light which create a genuine question concerning representation which the Board must resolve by conducting a representation election.

C. ***A writ should be granted on the "ratification" issue because it involves an important question of federal law which has not been but should be decided by this Court.***

In *Montgomery Ward & Co.,* 115 NLRB 645, 647 (1956), *enf'd.,* 242 F.2d 497 (2d Cir.), *cert. denied,* 355 U.S. 829 (1957), the Board held that "when a supervisor is a member of the union, the company is responsible for his circulation of anti-union petitions only if it encouraged, authorized, or ratified — in other words affirmatively participated in — the supervisor's activities." The reason an employer cannot "participate in" the decertification process is to give effect to the policy of the NLRA that

employees have free choice in representation issues. *See, e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584, 599, 61 S. Ct. 358, 85 L.Ed.2d 368 (1941). If an employer has affirmatively participated in or encouraged employee support for the petition, then the Board considers the petition "tainted" and ineffectual.

In the instant case, relying on *Montgomery Ward & Co.*, the Board ruled that the head meatcutters' own statements in support for decertification (which were not shown to have been authorized or encouraged by the employer) were later "ratified" by a management representative and that this "ratification" tainted the petition. This ruling is wholly irrational because the so-called "ratification" took place *after* the decertification petition had been lawfully circulated, signed by employees without employer influence, and filed with the Board. Such "ratification" could in no way have influenced the employees' exercise of free choice in signing the petition expressing their opposition to representation by Local 1529.

Petitioners respectfully suggest that the Board's "ratification" doctrine is irrational and raises an important question of federal law which has not but should be decided by this Court.

CONCLUSION

Wherefore, Petitioners pray that a writ of certiorari be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted this 29th day of January, 1992.

DAVID P. JAQUA
Kullman, Inman, Bee, Downing & Banta
A Professional Corporation
1410 Clark Tower, 5100 Poplar Avenue
Memphis, Tennessee 38137
Telephone: (901) 763-1771
Counsel of Record for Petitioners

(2)

91-1263
NO.

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX
VOLUME I
Decision of the Administrative Law Judge dated May 4, 1984

David P. Jaqua
Kullman, Inman, Bee, Downing & Banta
5100 Poplar, Suite 1410
Memphis, TN 38137
Telephone: (901) 763-1771
Counsel of Record
for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Decision of the Administrative Law Judge dated May 4, 1984 ..... A-1

APPENDIX A

JD—(ATL)—38—84
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

SEWELL-ALLEN BIG STAR, INC.

and CASE 26—CA—9834

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, LOCAL NO. 1529

BAKER'S BIG STAR STORES NOS. 31, 61, 64, AND 81

and CASE 26—CA—9841

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529

WADELL BRAMLETT AND LOIS TACKETT d/b/a BRAMLETT TACKETT BIG STAR NO. 30

and CASE 26—CA—9877

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529, AFL-CIO

WADELL BRAMLETT AND LOIS TACKETT d/b/a BRAMLETT TACKETT BIG STAR NO. 30; GILBERT ALLEN BIG STAR NO. 142; SEWELL-ALLEN BIG STAR, INC., STORES NOS. 103, 187, and 189; BAKER'S BIG STAR STORES NOS. 31, 61, 64, AND 81

and CASE 26—CA—9896

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1529

PIC-PAC FOODS, INC., A SUBSIDIARY OF MALONE & HYDE, INC.

and CASES 26—CA—9937-1
26—CA—9963-1

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529

GIANT FOODS, INC., A SUSIDIARY OF MALONE & HYDE, INC.

and CASES 26—CA—9937-2
26—CA—9963-2

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529

SMF MANAGEMENT, INC. d/b/a SMF FOOD RITE SUPERMARKETS

and CASE 26—CA—9989

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529

W. Paul Tuberville, Esq., and Bruce E. Buchanan, Esq., of Memphis, TN, for the General Counsel.

Lynn A. Agee, Esq. and Deborah Godwin, Esq., (Gerber, Gerber, & Agee), of Memphis, TN, for the Charging Party.

Howard S. Linzy, Esq., and R. Pepper Crutcher, Esq., (Kullman, Lange, Inman, & Bee), of New Orleans, LA, for Respondents Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142; Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; Baker Bros. Inc. d/b/a Baker's Big Star Nos. 31, 61, 64, and 81; Sewell-Allen Big Star, Inc., d/b/a Sewell-Allen Big Star No. 189; and Sewell-Allen Big Star, Inc. No. 2 d/b/a Sewell-Allen's Big Star No. 103.

Ernest R. Malone, Jr., Esq., and Cornelius Heusel, Esq., (Kullman, Lang, Inman & Bee), of New Orleans, LA, for Respondents Pic-Pac Foods, Inc., a subsidiary of Malone & Hyde, Inc., and Giant Foods Inc., a subsidiary of Malone & Hyde, Inc.

DECISION[1]

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 14 separate days between January 17, 1983 and April 11, 1983, at Memphis, Tennessee, pursuant to a consolidated complaint isued by the Regional Director for Region 26 of the National Labor Relations Board (the Board) on December 10, 1982, and is based on charges filed by Local 1529, United Food and Commercial Workers Union ("Local 1529" or "the Union" or the "Charging Party"). The central issue involves

---

[1] The vast majority of the events which will be related in this decision took place in 1982. Therefore, all dates and events refer to those occurring in 1982 unless otherwise specified.

allegations of violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), against each of the Respondents for their alleged withdrawal of recognition from and refusal to bargain with Local 1529 as the the collective bargaining representative of their employees following a merger between Local 1529 and Local 452 (Local 452) of the United Food and Commercial Workers International Union wherein Local 1529 was the surviving union. Additionally, violations of Sections 8(a)(5), and (1) of the Act related to this issue are alleged against the Respondents and independent violations of Sections 8(a)(1), (3) and (5) of the Act are alleged against certain, but not all, of the Respondents.

The complaint in Case 26—CA—9834 was filed on September 30, 1982, and is based on a second amended charge filed by Local 1529 on September 1982, and, as amended at the hearing, alleges that Sewell-Allen Big Star, Inc. (Sewell-Allen) and Sewell-Allen Big Star, Inc. No. 2 (Sewell-Allen No. 2) committed violations of Sections 8(a)(1)(3) and (5) of the Act. The complaint in Case 26—CA—9834 is joined by the answer of Respondents Sewell-Allen and Sewell-Allen No. 2 filed on October 2, 1982, wherein they deny the commission of any violations of the Act. The complaint in Case 26—CA—9841 was filed on September 30, 1982, by the Regional Director of Region 26 of the National Labor Relations Board, and is based on a first amended charge filed by Local 1529 on September 22, 1982, and as amended at the hearing, alleges that Respondent Baker Bros., Inc. (Bakers) committed violations of Section 8(a)(1) and (5) of the Act. The complaint in Case 26—CA—9841 is joined by the answer of Respondent, Bakers, filed on October 12, 1982, wherein it denies the commission of any violations of the Act. The complaint in Case 26—CA—9896[2] was filed on November 10, 1982, by

---

[2] A complaint filed against an additional Respondent, Wadell Bramlett and Lois Tackett d/b/a Bramlett Tackett Big Star No. 30, in this case and in Case 26—CA—9877 was withdrawn and said cases were severed from this proceeding by the Order of the Regional Director for Region 26 which Order was issued on January 12, 1983.

the Regional Director of Region 26 of the National Labor Relations Board, and is based on a first amended charge filed by Local 1529 on November 3, 1982, and, as amended at the hearing, alleges that Respondents Gilbert Allen Big Star, Inc. (Gilbert Allen Big Star), Sewell-Allen, Sewell-Allen No. 2, Sewell's Big Star, Inc. (Sewell's Big Star) and Bakers, committed violations of Section 8(a)(1) and (5) of the Act. By his Order of November 10, 1982, the Regional Director for Region 26 consolidated Cases 26—CA—9834, 26—CA—9841, 26—CA—9877 and 26—CA—9896 and set a hearing date of January 17, 1983. The complaint in Case 26—CA—9896 is joined by the answer of Respondents Gilbert Allen Big Star, Sewell-Allen, Sewell-Allen No. 2, Sewell's Big Star, and Bakers wherein said Respondents deny the commission of violations of the Act. An Order Consolidating Cases and a Consolidated Complaint was issued in Cases 26—CA—9937-1 and 26—CA—9963-1 against Respondent Pic-Pac Foods, Inc., (Pic-Pac) a subsidiary of Malone & Hyde, Inc., (Malone & Hyde) and in Cases 26—CA—9937-2 and 26—CA—9963-2 against Respondent Giant Foods, Inc., (Giant) a subsidiary of Malone & Hyde, Inc., on November 24, 1982, by the Regional Director for Region 26. These complaints are based on charges filed by Local 1529 on November 9, 1982. The consolidated complaints in Cases 26—CA—9937-1, and 2, and 26—CA—9963-1 and 2 as amended at the hearing, allege the commission of violations of Section 8(a)(1) and (5) of the Act by Respondents Pic-Pac and Giant. By his Order of November 26, 1982, the Acting Regional Director for Region 26 consolidated Cases 26—CA—9841, 26—CA—9877,[3] 26—CA—9896, 26—CA—9937-1, 26—CA—9963-1, 26—CA—9937-2, and 26—CA—9963-2, and set a hearing date of January 13, 1983. The complaints in Cases 26—CA—9937-1 and 2, and Cases 26—CA—9963-1 and 2 are joined by the answers of Respondents Pic-Pac and Giant filed on December 7, 1982, wherein they deny the commission of violations of the Act. The complaint in Case

[3] See footnote 2.

26—CA—9989 was filed on December 9, 1982, by the Regional Director for Region 26 and is based on a first amended charge filed by Local 1529 on December 9, 1982, and alleges that Respondent SMF Management, Inc., (SMF) has violated Section 8(a)(1) and (5) of the Act. The complaint in Case 26—CA—9989 is joined by the answer of Respondent SMF filed on December 20, 1982, wherein it denies the commission of violations of the Act. By his Order of December 10, 1982, the Regional Director for Region 26 consolidated Case 26—CA—9989 with Cases 26—CA—9934, 26—CA—9841, 26—CA—9877, 26—CA—9896, 26—CA—9937-1 and 2, and 26—CA—9963-1 and 2, and set a hearing date of January 17, 1983. A motion to strike portions of Respondents' answer was filed by the General Counsel in Cases 26—CA—9937-1 and 2, and 26—CA—9963-1 and 2 on January 5, 1983. On January 7, 1983, the Regional Director for Region 26 filed amendments to the complaint in Case 26—CA—9896 and the consolidated complaint in Cases 26—CA—9937-1 and 2 and 26—CA—9963-1 and 2 and the complaint in Case 26—CA—9834. On January 6, 1983, Respondents Pic-Pac and Giant filed a joint motion to sever the proceedings pursuant to Sections 102.24 and 102.33 of the Board's Rules and Regulations. On January 14, 1983, Respondents Pic-Pac and Giant filed a motion to strike the amendment to the consolidated complaint issued by the Regional Director on January 7, 1983. On January 18, 1983, the General Counsel filed a motion to amend consolidated complaint in Cases 26—CA—9937-1 and 2 and 26—CA—9963-1 and 2. At the commencement of the hearing, all Respondents filed and argued motions to sever the cases of each from the proceedings. These motions were denied by the undersigned on the basis that all of the cases had a common issue of fact and law arising from Respondents' alleged withdrawal of recognition from and refusal to bargain with Local 1529 following a merger between Local 452 and Local 1529. A special appeal was taken from this ruling to the Board and was denied by the Board's order of January 26, 1983. Respondents have

re-urged their motion to sever proceedings. Said motions are again hereby deined.

Upon the entire record in this proceeding, including my observation of the witnesses that testified herein, and after due consideration of the positions of the parties and briefs filed by the General Counsel, counsel for Charging Party, and counsel for Respondents, I make the following:

Findings of Fact and Analysis[4]

I. The Business and Status of Respondents

The complaints allege that each of the Respondents were employers within the meaning of Section 2(6) and (7) of the Act. This was admitted by the Respondents in their answers. Moreover, the uncontroverted testimony of the owners and officers of each of the Respondents established that each of the Respondents, in the course and conduct of their business operations for the year preceding the filing of the complaints and at all times material herein, operated retail grocery stores which annually derived gross revenues in excess of $500,000, and that each of the Respondents annually purchased and received goods and products at their respective facilities which were in excess of $10,000 from points located outside the state in which their facilities are located.

Each of the Respondents, with the exception of Respondent Gilbert Allen Big Star, is a corporation with offices and places of business in Memphis, Tennessee. Although in its answer to the complaint, Gilbert Allen Big Star, admitted an allegation that was a proprietorship, I find on the basis of the unrebutted testimony at the hearing of Gilbert Allen, that it is a corporation of which he is president and sole owner and that it has an office and place of business in Olive Branch, Mississippi.

---

[4] The following includes a composite of the testimony of the witnesses.

Respondent Sewell's Big Star, Inc., d/b/a Store No. 187 contends that it has never been named a party to any case in this proceeding and moved, at the hearing and in its brief, to strike the allegations in Case 26—CA—9834 and testimony in support thereof. A review of the General Counsel's exhibits discloses that on August 20, 1982, the initial charge in Case 26—CA—9834 was filed against Sewell-Allen Stores at 3650 Hickory Hill Road, (Big Star No. 189), Memphis, Tennessee 38138, and that a copy of the charge was mailed by certified mail to that address. On September 1, 1982, a First Amended Charge was filed against Sewell-Allen Stores at 3650 Hickory Hill Road, and 6200 Stage Road in Memphis, Tennessee, and a copy of that charge was mailed to 3650 Hickory Hill Road and to 6200 Stage Road (Big Star No. 103) in Memphis, Tennessee, by certified mail. On September 24, 1982, a Second Amended Charge was filed against Sewell-Allen Stores at the Hickory Hill and Stage Road addresses, and copies of that charge were mailed to both addresses by certified mail. The initial complaint in Case 26—CA—9834 was filed on September 30, 1982 against Sewell-Allen Big Star, Inc., and referred to the original, first amended and second amended, charges in this case and asserted that Respondent was a corporation with two places of business at Stage and Hickory Roads in Memphis, Tennessee. Sewell-Allen Big Star, Inc., No. 189 d/b/a 3650 Hickory Road and Sewell-Allen Big Star, Inc., No. 2 d/b/a 6200 Stage Road filed a joint answer to the complaint on October 12, 1982. On September 27, 1982, an initial charge was filed in Case 26—CA—9896 alleging a refusal to bargain with Local 1529 against a number of Employers, including the two above named employers and "Mr. Lex Sewell Big Star No. 187 at 4400 Summer Avenue, Memphis, Tennessee 38172," who was served by registered mail. As developed at the hearing, the correct title of this Employer is Sewell's Big Star, Inc., d/b/a Store No. 187. A First Amended Charge was filed in Case 26—CA—9896 on November 3, 1982, against Sewell—Allen Big Star, Inc., Stores Nos. 103, 187, and 189 at 6200 Stage Road. Thereafter, a consolidated

complaint was issued against Sewell-Allen Big Star, Inc., Stores Nos. 103, 187, and 189 in Case 26—CA—9896 and others on November 10, 1982. An answer was filed on behalf of Sewell-Allen Big Star, Inc., Stores Nos. 103, 187, and 189 as a named Respondent in Case 26—CA—9896, and the other named Respondents on December 20, 1982, which denied that Sewell-Allen was a partnership as originally alleged in the complaint but made no specific reference to Store No. 187.

I find that under the circumstances, Respondent Sewell's Big Star, Inc. Inc., d/b/a Sewell's Big Star No. 187 has been charged and is properly a party in Case 26—CA—9896 only. It is clear from the foregoing that this Respondent was initially served with a charge at its correct address in the case, and that it has had actual notice of the charge filed against it, and has answered, participated in, and defended this action throughout. A misnomer of a respondent in a charge or complaint is not sufficient ground to quash the complaint where respondent has actual notice of the charge and complaint and files an answer thereto and participates in the hearing as I find Respondent Sewell's Big Star, Inc., d/b/a Big Star No. 187, did in this proceeding. *Peterson Construction Co.*, 106 NLRB 850 (1953); *NLRB v. Process & Pollution Control Co.*, 588 F.2d 786, fn. 1 at 788 and 789 (10th Cir. 1978). I, however, grant the motion of Respondent Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187 to strike any allegations and supporting testimony with respect to it insofar as they arise from the complaint in Case 26—CA—9834 to which I find Respondent Sewell's Big Star, Inc. has never been made a party.

I also find that the evidence presented by the General Counsel is insufficient to show that Sewell's Big Star is a single employer with Sewell-Allen or is the alter ego of either Sewell-Allen or Sewell-Allen No. 2. I find, however, that Respondent Sewell's Big Star, Inc., operates a retail grocery store in Memphis, Tennessee, known as Big

Star Store No. 187, and that Lex Sewell is sole owner of the corporation and an officer therein.

Respondent Sewell-Allen Big Star, Inc. owns and operates Big Star Store No. 189. This corporation is owned by Lex Sewell and R. Dan Allen, each of whom have a 50 percent interest therein. Allen is the president and Sewell is the secretary-treasurer of the corporation.

Respondent Sewell-Allen Big Star, Inc., No. 2 is a separate corporation and owns and operates Big Star Store No. 103. This corporation is also owned by Lex Sewell and R. Dan Allen, each of whom have a 50 percent interest therein. Allen is also the president and Sewell is also the secretary-treasurer of this coporation.

Baker Brothers, Inc., is a corporation owned by Alvin Baker and his three brothers. Alvin Baker, who is the president of the corporation, and his three brothers and his son Mike Baker all sit on the Board of Directors of the corporation. The corporation owns and operates Baker's Big Star Stores Nos. 31, 61, 64, and 81.

Respondent SMF Management, Inc., d/b/a SMF Food Rite Supermarkets, is a corporation which operates five retail grocery stores in and around Memphis and Collierville, Tennessee, and a sixth store in Hernando, Mississippi. Glen Smithart is the president and one of three owners of this corporation. The other two owners of this Respondent are Kenneth Miller and Thomas Faulk.

Respondents Pic-Pac, Inc., and Giant Foods, Inc., are each subsidiaries of Malone & Hyde, Inc., and are retail grocery chains operating stores under these names. Malone & Hyde, Inc., is a wholesale grocery distributor.

Accordingly, I find that Respondents Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142; Sewell's Big Star, Inc. d/b/a Sewell's Big Star No. 187; SMF Management,

Inc. d/b/a SMF Food Rite Supermarkets; Baker Bros., Inc. d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81; Sewell-Allen Big Star, Inc. d/b/a Sewell-Allen's Big Star No. 189; Sewell-Allen Big Star, Inc. No. 2 d/b/a Sewell-Allen's Big Star No. 103; Pic-Pac Foods, Inc., a subsidiary of Malone & Hyde, Inc.; and Giant Foods, Inc., a subsidiary of Malone & Hyde, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Status of the Labor Organization

I find on the basis of the unrebutted testimony of Leon Sheppard, President of United Food and Commercial Workers, Local 1529; Michael A. Mancini, Secretary-Treasurer of Local 1529; and Eugene Burris, Director of Operations, of Local 1529 that the Union is engaged in the representation of and bargaining on behalf of employees with employers concerning wages and other terms and condictions of employment and is a labor organization within the meaning of Section 2(5) of the Act, as alleged in the complaints.

III. The Appropriate Units

The labor agreements executed between Respondents and Local 452, United Food and Commercial Workers covering the meat department employees of each of the Respondents contain the following unit description:

> The Employer recognizes the Union as the sole and exclusive collective bargaining agent for the following classifications in its stores operated in Memphis, Tennessee, and vicinity, namely: head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks. (Wrappers—Giant, Pic-Pac, and SMF).

(G.C. Exhs. 7, 8, 56, 58, 59, 60, and 62(b)). I find the above

unit description(s) constitute the appropriate unit(s) covering the meat department employees for each of the Respondents.

The labor agreements executed between Respondents Giant and Pic-Pac Covering their grocery and produce department employees contain the following unit description:

> The Employer recognizes the Union as the sole and exclusive collective bargaining agent of its employees, except meat market and professional employees.

(G.C. Exhs. 61, 62(a)). I find the above unit description to constitute the appropriate units covering the grocery and produce department employees of Respondents Giant and Pic-Pac.

IV. The Alleged Unfair Labor Practices

A. Background

In 1979, the Amalgamated Meat Cutters and Butcher Workmen of North America merged with the Retail Clerks International Union to form the United Food and Commercial Workers Union (UFCW). As a consequence of that merger, Meat Cutters District Union 452 (Local 452) and Retail Clerks Local 1529 (Local 1529) became United Food and Commercial Workers Local 452 and United Food and Commercial Workers Local 1529, respectively. In January 1982, executive officers of Local 452 and Local 1529 met with UFCW's Representative, Robert E. Burris, following the initiation of discussions of a merger between the two local unions by Burris in the fall of 1981 on behalf of the International UFCW. At the January 1982 meeting, an agreement was reached to merge Locals 452 and 1529 with Local 1529 to emerge as the surviving union. The merger of Local 452 with Local 1529 was approved by the

executive board of Local 452 on January 7, 1982. The executive board of Local 1529 had previously authorized Local 1529 President and Chief Executive Leon Sheppard to consummate the merger in the fall of 1981. Letters dated January 14, 1982, were sent by Local 452 to its members notifying them of the proposed merger and of voting to take place at a series of meetings to be held in February 1983. Local 452 represented separate bargaining units of meat cutters at the stores of Respondents and at various other locations and also bargaining units of produce and grocery employees at Respondents Pic-Pac and Giant.

The meetings numbered 10 in total. Attendance and voting was restricted to bargaining unit employees who were members of Local 452. Nonmembers of Local 452 were not notified by Local 452 of the proposed merger and the meetings wherein the merger was to be submitted to a vote. On at least one occasion according to the unrebutted testimony of Michael A. Mancini, the president of Local 452 who chaired the meetings, nonmembers were asked to leave a meeting. The meetings and voting were generally but not uniformly scheduled by individual bargaining units or by a group of several bargaining units in the case of the smaller bargaining units. The format of the meetings was virtually identical according to the unrebutted testimony of Mancini and Burris each of whom attended all of the meetings, and as corroborated in part by Local 452's Business Manager John Lambert, Local 1529's President Leon Sheppard, and Local 1529's Business Agent David Jennings, each of whom attended some, but not all, of the meetings. Mancini opened the meeting and referred to the letter of January 14, 1982, and the proposal to merge the two local unions. He then introduced Burris who read through the merger proposal and informed the members that the merger documents and agreements would be made available for their reference. Burris offered to and did answer questions of the members in attendance concerning the merger. At the initial meeting, no questions were asked. On at least one occasion, Sheppard also answered

questions directed to him concerning the merger. Following a discussion of the merger, two members were selected to count the votes and a vote was taken by a showing of hands. At all but the initial meeting which included only a small group of employees who were known to Mancini, an attendance sheet was kept. The final tally of votes of the members in attendance at the conclusion of the voting of the series of 10 meetings was 432 votes in favor of the merger, 72 votes against the merger, and 28 abstentions. Following the vote and upon application of Local 1529, the UFCW approved the merger on April 1, 1982, and it became effective on that date. The officers of the two local unions commenced to carry out the merger agreement terms, including the transfer of the assets of Local 452 to Local 1529, the surviving union. On April 7, 1982, letters were sent to the Respondents and other employers notifying them of the merger of Locals 452 and 1529, and that Local 1529 was the new collective bargaining representative of the employees in the bargaining units formerly represented by Local 452. These letters were sent by Mancini on behalf of Local 1529, and stated:

> This letter is to formally advise you that United Food & Commercial Workers Local No. 452 and United Food & Commercial Workers Local No. 1529 *with the approval of the membership,* have effected a merger pursuant to the provisions of the Constitution of the United Food and Commercial Workers International Union. The merged Local Unions, in accordance with the charter issued on April 1, 1982, will operate under the name of United Food & Commercial Workers Local 1529 (chartered by the United Food and Commercial Workers International Union). This letter may be attached to the collective bargaining agreement, so that the change is properly reflected. (Underlining added.)
>
> The merger in no way affects the autonomy of the Local Union and, in any event, is purely an

internal matter having no effect on the relationship between Local No. 452 and (name of store).

Local Union No. 1529 will continue to administer the contract and in all respects continue as the collective bargaining representative of the employees covered by the contract.

All Respondents thereafter dealt with Local 1529 as the representative of their employees during the term of their various collective bargaining agreements each of which had been executed with Local 452 and each of which were due to expire by its terms on October 31, 1982. Grievances were processed, dues were deducted and remitted to Local 1529 by those Respondents whose contracts contained dues deduction clauses. Certain of the Respondents (Sewell's Big Star, Sewell-Allen, Sewell-Allen No. 2, and Bakers) met in bargaining sessions with Local 1529 concerning increases in insurance contributions then scheduled to be made by Respondents in June 1982. Health and welfare and pension fund payments were also made by Respondents whose employees were covered thereby in accordance with their labor agreements.

Respondent Bakers is alleged to have engaged in unlawful interrogation, threats, and to have promised benefits and unlawfully solicited its employees in Stores Nos. 31, 61, 64, and 81 in order to encourage them to abandon their support of Local 1529 and to have unlawfully supported and encouraged the circulation of two decertification petitions among its employees, and to have unlawfully caused the removal of UFCW handbillers from areas adjacent to the outside of its Store No. 61. Respondents Sewell-Allen and Sewell-Allen No. 2 are alleged to have engaged in unlawful interrogation, threats, promise of benefits, and to have unlawfully solicited their employees to abandon the union and to have unlawfully caused the circulation of a decertification petition at their store(s) in order to cause their employees to abandon the Union (Local 1529) and to have demoted an employee and discharged three part-time

employees in the summer of 1982, and to have unlawfully discharged a full-time employee in January 1983, in order to discourage support for Local 1529 among its employees.

On July 30, 1982, Local 1529's President Leon Sheppard requested by letter sent to each of the Respondents to commence bargaining for a new labor agreement to replace the existing labor agreement which was to expire by its terms on October 31, 1982, and in that letter Sheppard also requested information to prepare for bargaining. Some of the Respondents commenced to gather that information and at least one Respondent's representative (John Paul Jones), the personnel manager of Malone & Hyde who is responsible for personnel and labor relations policies of its subsidiaries Pic-Pac and Giant, informally showed Local 1529 representatives portions of the requested information which he was in the process of gathering in response to Sheppard's request. On July 23, 1982, the Board issued its decision in *Amoco Productions Co.*, 262 NLRB 1240 (1982), wherein it held that an affiliation vote between two locals of different international unions was invalid because nonmembers of the bargaining unit had not been allowed to vote. In November 1982, a meeting was called by Howard Linzy, Esquire who represented and provided legal counsel on matters of labor relations to a number of individual store owners which did business under the names of Big Star and Food Rite markets and which purchased goods and services from Malone & Hyde pursuant to arrangements with Malone & Hyde to do business under the trade names "Big Star" or "Food Rite," in which Malone & Hyde claims an interest and to purchase certain of the goods and services made available to them by Malone & Hyde. These individual store owners are referred to as "independents" as distinguished from Pic-Pac and Giant, each of which is a subsidiary of Malone & Hyde. Linzy and the law firm of Kullman, Lang, Inman, & Bee of which he is a member represented these independents pursuant to an agreement wherein they paid funds into a common escrow fund maintained by Malone & Hyde from which the law

firm was paid for its legal services. Linzy and the law firm of Kullman, Lang, Inman & Bee also represents and provides legal services to Malone & Hyde and its subsidiaries, Giant and Pic-Pac. The meeting was attended by other independents in addition to the Respondents herein. No officers or in-house representative of Malone & Hyde or of its subsidiaries Pic-Pac and Giant attended the meeting. At this meeting, Linzy advised those in attendance that the merger of Locals 452 and 1529 might be illegal in light of the *Amoco* case because nonmembers of the bargaining unit had not been permitted to vote.

In the fall of 1982, certain of the Respondents attended initial bargaining sessions with Local 1529. On October 7, 1982, Gilbert Allen attended a bargaining session on behalf of Gilbert Allen Big Star along with other independents who are not a party to the proceeding, at which representatives of Local 1529 submitted a contract proposal to amend the existing labor agreement. Initial negotiation meetings were also held between Respondent Pic-Pac and Local 1529 on October 8 and 21, 1982, and between Giant and Local 1529 on October 7, 1982. Negotiations were also held on October 13, 1982, between Local 1529 and Sewell's Big Star, Inc., Sewell-Allen, and Sewell-Allen No. 2. On November 8, 1982, following the expiration of their labor agreements with Local 452, Respondents Sewell's Big Star, Inc., Sewell-Allen, Inc., Sewell-Allen No. 2, Gilbert Allen Big Star, Bakers, and SMF, notified Local 1529 by identical letters drafted by their legal counsel, Howard Linzy, which letters stated that they no longer recognized Local 1529 as the bargaining representative of their employees on the ground that the merger between Local 452 and Local 1529 was invalid because bargaining unit employees who were not members had not been permitted to vote in the merger election. Respondents Pic-Pac and Giant also advised Local 1529 by their letters of December 2, 1982, that they no longer recognized Local 1529 as the bargaining representative of their employees as the merger of Local 452 and Local 1529 was invalid because

substantial numbers of bargaining unit employees had neither received notice of nor been permitted to vote on the merger issue.

Respondents deny the commission of any unfair labor practices and assert that numerous defects in the merger process provided justification for their withdrawals of recognition and refusals to bargain with Local 1529 as the bargaining representative of their employees.

B. The Merger Issue

As set out above, Local 1529 and Local 452 entered into a merger agreement which was to become effective April 1, 1982, following a vote by the membership of Local 452 at a series of meetings conducted in February 1982 and approval by the executive boards of both local unions and approval by the International Union (UFCW). The parties commenced to carry out the terms of the merger by the transfer of assets from Local 452 to Local 1529, the surviving union shortly thereafter. Under the terms of the merger agreements, individual store bargaining units remained intact for bargaining purposes as in the past. Local 452's President, Michael Mancini, was appointed as secretary-treasurer of Local 1529. Local 452's Business Manager and Chief Executive Officer John Lambert was retained as a paid consultant by Local 1529 with no specific duties provided therefor pending his retirement. He was also furnished an automobile pursuant to the earlier approval by the executive board of Local 452. Both Mancini and another member of the executive board of Local 452 were appointed to the executive board of Local 1529. In addition, another business representative of Local 452 and the office secretary of Local 452 were retained by Local 1529. Mancini was furnished an office at Local 1529 facilities. The offices of Local 452 were retained by Local 1529 and were used by Lambert and by Robert Burris and other Local 1529 business representatives as well as membership meetings for individual store units which had previously been

represented by Local 452. Although there were some differences in the new structures of the two locals, dues of the members of Local 452 were not immediately changed. Members of Local 452 became members of Local 1529 with full rights and privileges thereunder and without the requirement to apply or to be admitted to membership or to pay initiation fees.

Respondents have raised several challenges to the validity of the merger, the principal one of which is that nonmembers of Local 452 were not permitted to vote concerning the merger issue. There were also some arguments raised by Respondents concerning the hearsay information allegedly received by Gilbert Allen, president of Gilbert Allen Big Star, Inc., that some of his employees who were members of Local 452 were not permitted to vote, and of similar hearsay information received by John Paul Jones, the personnel manager of Malone & Hyde who has responsibility for personnel policies at its subsidiaries Pic-Pac and Giant to the effect that meetings were not scheduled so as to allow all the Pic-Pac and Giant employees to attend. Respondents, at the hearing and in their briefs, also contended that the membership was not permitted to vote by individual store units, were not fully informed of the terms of the merger (i.e., the terms of pay as consultant for John Lambert and the assignment of an automobile for his use), that the meetings were conducted under the watchful eyes of Local 1529 representatives and that balloting was by a showing of hands rather than by secret ballot among other due process challenges thereto.

It is undisputed that Local 1529 notified each of the Respondents by letter of April 11, 1982, of the merger and of Local 1529's purported status as a representative of the employees formerly represented by Local 452. Respondents continued to deal with Local 1529 following their receipt of the notification letter from Mancini notifying them of the merger of Local 452 and Local 1529 whereby Local 1529 was the surviving union. All

Respondents continued to follow their respective labor agreements with Local 452, including the remission of dues in the case of some Respondents and health, welfare and pension benefits in the case of all Respondents except Pic-Pac and Giant with respect to their grocery and produce employees who were not covered by a pension plan. All Respondents continued to follow the grievance procedure in accordance with the contracts. Some Respondents (Sewell-Allen, Sewell-Allen No. 2, Sewell's Big Star, and Bakers) met with Local 1529's President John Sheppard to bargain concerning a mid-contract term modification of the pension plan payments. Each of these Respondents was accompanied and represented by its attorney, Howard S. Linzy, at these meetings in June 1982.

According to the testimony of certain of these Respondents, they were unaware of any defects in the merger process until the late summer or early fall of 1982 when they became aware that nonmembers had not been permitted to vote, and in one instance, that members may have been late to a meeting and had not been permitted to vote. In his affidavit, Dan Allen, one of the two owners of Sewell-Allen and Sewell-Allen No. 2, stated that he had heard that nonmembers had not been permitted to vote from other owners. At the hearing, he testified that he had heard of this from employees and from his brother Gilbert Allen. Lex Sewell, the other co-owner of Sewell-Allen and Sewell-Allen No. 2, and the sole owner of Sewell's Big Star, testified that he learned of this from his partner Dan Allen. Al Baker, president of Bakers and his son Mike Baker, who is a vice president of Bakers testified that they had heard from other employees that members had not been permitted to vote. There was some discussion of this issue at a meeting of individual store owners held in November 1982 with Attorney Howard S. Linzy when he advised them of the Board's recent decision in the *Amoco* case, supra, wherein the Board had held in August 1982 that an affiliation vote was invalid because nonmembers of the local union had not been permitted to vote, and that the merger

between Locals 452 and 1529 might also be invalid. There were no representatives of Pic-Pac and Giant, the two subsidiaries of Malone & Hyde, at the meeting chaired by Attorney Linzy. However, John Paul Jones, the personnel director of Malone & Hyde who has responsibility for personnel policies at Pic-Pac and Giant and at Malone & Hyde was advised by Linzy by telephone that the merger might be invalid because nonmembers of Local 1529 who were bargaining unit members of meat department employees and of produce employees at Pic-Pac and Giant had not been permitted to vote, in view of the *Amoco* case. Jones met with officials of Local 1529 and the International Representative of UFCW in bargaining on behalf of Pic-Pac and Giant on October 21 and 22, 1982, but refused to bargain further until the Union gave him more information concerning the merger vote. Subsequently, Respondents Sewell-Allen, Sewell-Allen No. 2, Sewell's Big Star, Gilbert Allen Big Star, Bakers, and SMF each issued identical letters prepared by Linzy, dated November 8, 1983, wherein they withdrew recognition from Local 1529 on the ground that nonmembers of the union had not been permitted to vote concerning the merger. As set out above, these letters were all drafted by Howard Linzy on their behalf and were also similar to letters sent on the behalf of Giant and Pic-Pac on December 2, 1982, which also asserted that members of the Union had not been notified and permitted to vote at reasonable times in support of their contention that the merger was invalid. All Respondents have since refused to recognize Local 1529 as the bargaining representative of their employees and have refused to furnish information for bargaining.

There are several issues concerning the merger process which were initially presented for resolution. (1) Whether Respondents had notice of the merger vote of Local 452 and Local 1529? (2) Whether Respondents were advised or had knowledge that nonmembers of the various bargaining units were not permitted to vote? (3) Whether Respondents are barred by the 6-month limitation period

set out in Section 10(b) of the Act (proscribing the filing of unfair labor practices beyond 6 months after the incident has occurred) from asserting the purported lack of majority status of the Union (Local 1529) as a defense of refusal to bargain charges resulting from their withdrawal of recognition from the Union. (4) Whether the Respondents are estopped from challenging the validity of the merger between Local 452 and Local 1529 because they waited until November 8, or December 2, 1982, to challenge the validity of the merger. (5) Whether the merger is invalid on due process grounds? (a) Whether the refusal by the Union to permit nonmembers to vote invalidates the merger? (b) Whether the failure to conduct a vote of members of Local 1529 (the surviving union) invalidates the merger? (c) Whether the members were sufficiently informed of the details of the merger so as to be able to make an informed choice? (d) Whether the lack of a secret ballot invalidates the merger? (6) Whether there is sufficient continuity between Local 452 (the merged Union) and Local 1529 (the surviving Union) so as to entitle Local 1529 to representative status as a successor of Local 452?

Michael A. Mancini testified at length concerning the merger between Local 1529 and Local 452. As set out above, Mancini is secretary-treasurer of Local 1529, a position he has held since April 1, 1982. Prior to that time, he was president of Local 452. He testified that Local 1529 exists for the purpose of representing employees and that employees in Local 1529 participate in the organization by electing officers, voting on increases and assessment of dues, participation in all meetings, approving minutes of the executive board, and a great number of other matters pertaining to the running of a local union that must be approved by the membership. Local 1529 represents employees with respect to wages, hours and other terms and conditions of employment.

Mancini testified that Local 1529 engaged in negotiations with Respondents Sewell's Big Star, Sewell-Allen,

Sewell-Allen No. 2, and Bakers in regard to an increase in health and welfare payments. Mancini and Burris attented a meeting in June 1982 at Local 1529's office with Lex Sewell, Dan Allen, and their attorney, Linzy, concerning this matter. During this meeting, each of the Big Star stores with which Sewell and/or Allen was affiliated were discussed including Big Star No. 62 which is owned solely by Allen, Big Star Nos. 103, 137, and 189. At no time during this meeting did Sewell or Allen, or their attorney, raise an objection to bargaining with Local 1529. Later that day, Mancini met with Alvin Baker and Linzy on behalf of Bakers to discuss the increase in health and welfare payments by Baker. There were no objections raised by Baker or Linzy to bargaining with Local 1529 at this meeting. Prior to the merger, Respondents Bakers, Pic-Pac, and Giant had remitted dues on behalf of their employees to Local 452 pursuant to a dues checkoff provision in their contracts with Local 452. Following the merger, Bakers, Pic-Pac, and Giant remitted the Dues to Local 1529 at its office rather than to Local 452. Additionally, Respondents Bakers, Pic-Pac, and Giant had remitted payments by their employees to Local 452 for a supplemental life insurance policy and, following the merger, remitted these payments to Local 1529. Mancini filed grievances with Sewell's, Sewell-Allen, and Sewell-Allen No. 2 in the summer of 1982 concerning the Union's contention that a journeyman meat cutter should be on duty during night time hours; he received no response to these grievances.

Mancini testified that the initial negotiation meeting to execute a successor to the Union's contracts which were to expire on October 31, 1982, was held on October 7, 1982, with a group of independent store operators, including Gilbert Allen on behalf of Gilbert Allen's Big Star, the only one of which is a Respondent in this case. At this meeting, Mancini and Burris presented a copy of Local 1529's proposals, including a request to change the name of the Union in the agreements from Local 452 to Local 1529, and asked

the owners to examine the proposals, and Mancini and Burris then withdrew from the room. The owners met among themselves for an hour, and when Mancini and Burris returned, the owners informed them they were optimistic that an agreement could be reached. At this meeting, Gilbert Allen raised no objection to bargaining with Local 1529 nor to the proposed name change in the contract from Local 452 to Local 1529 as the designated collective bargaining representative.

An initial negotiation meeting for a new labor agreement was held on October 7, 1982, between Local 1529 and Giant concerning its meat department employees. Present at this meeting were Mancini on behalf of Local 1529, John Paul Jones, the personnel manager of Malone & Hyde; John LaRue, the division manager of Giant; and Clyde Cooksey, the meat merchandiser of Giant. In this meeting, Mancini handed a copy of the proposal which also included the requested change of name to Local 1529 to each of the representatives of Giant and several issues were discussed for a period of 45 minutes. The Giant representatives informed Mancini they wanted the opportunity to review the proposal and would get back to Mancini. No questions were raised by the Giant representatives concerning the merger vote or bargaining with Local 1529 rather than Local 452. An initial contract negotiations meeting took place between Local 1529 and Pic-Pac on October 8, 1982. Present at the meeting on behalf of Pic-Pac were Jones and William Creech, the division manager of Pic-Pac. The meeting concerned Pic-Pac's meat market employees. Mancini gave Jones and Creech a copy of the Union's proposals for a new labor agreement which was the same as that given to the Giant representatives on the prior day. At this meeting, no mention was made of the merger between Local 452 and Local 1529, nor were any objections raised by the Giant representatives to bargaining with Local 1529.

An initial contract negotiations meeting was held between Local 1529 and Respondents Sewell's Big Star,

Sewell-Allen, and Sewell-Allen No. 2, and was attended by Mancini and Union Representative Bill Smith on behalf of Local 1529, and by Lex Sewell and Dan Allen on behalf of Big Star Stores Nos. 103 and 189. Sewell stated he was negotiating for Store No. 187, of which he is the sole owner, separately at that meeting. Mancini presented the Union's proposals to Sewell and Allen and also gave them a summary sheet of the proposed changes in the labor agreement. Allen questioned the change in the first article of the proposed contract and inquired why it referred to Local 1529 rather than to Local 452. Mancini informed Allen that he (Allen) was aware there had been a merger in April. Allen told Mancini he had not been informed of the merger. Mancini told Allen the store owners had all been sent letters notifying them of the merger. Allen replied he had not received a letter, and asked whether nonmembers of the Union had been permitted to vote concerning the merger, and Mancini replied that nonmembers had neither been allowed to vote, nor had they been sent notices concerning the proposed merger. At that point, Allen stated that they (Sewell and Allen) would need to review the Union's proposals and would set another date to meet with the Union's representatives. Another negotiations meeting was scheduled between the Union and Sewell and Allen for October 20, but that meeting was later cancelled by Sewell and Allen. On October 21, 1982, an initial contract negotiations meeting was held between Local 1529 and Pic-Pac concerning the grocery employees. Mancini, Bill Smith, and John Gorlea, a representative of the UFCW, represented Local 1529, and Jones and Creech represented Pic-Pac at that meeting. Jones referred to the conversation between Mancini and Dan Allen at the previous meeting with Sewell's Big Star, Sewell-Allen, and Sewell-Allen No. 2, and inquired concerning the merger vote. Gorlea told Jones that they were there to negotiate a contract and that the merger was none of his business. Jones told the Union's representatives that he would not discuss the labor agreement until the merger matter was cleared up. Jones also stated that he had met with Giant's grocery department

earlier that day and that if this was the response he would have received to his inquiries, he would cancel that meeting also. Gorlea told Jones he would receive the same response the next day and the scheduled meeting with Giant concerning its grocery employees was also cancelled. Following this meeting, there were no further negotiations with any of the Respondents. Information requested by Local 1529 for collective bargaining with respect to the negotiation for a new labor agreement was received by the Union from SMF in a letter dated October 12, 1982.

Lex Sewell testified as follows: He received letters from the Union, Local 1529, informing him of the merger, the letters were dated April 7, 1982. At the time he received the letters, he raised no objections to the merger and continued to deal with Mike Mancini. He met in June 1982 with the Union to discuss Union proposed increases in insurance payments. He did so on behalf of all three stores in which he has an ownership interest, that is Big Star Nos. 103, 187, and 189. However, each store was discussed individually at the same meeting. After the date of the letter, he continued to accept grievances, continued to make payments to the Union's pension fund under his contract for each of the three stores, and also to the Union's health and welfare fund. He continued to pay insurance premiums and to deal with Mancini. Sewell testified that sometime prior to October 1982, he learned of a procedural question with respect to the merger vote from his partner in Big Star Nos. 103 and 189, Dan Allen. In late August, Allen told him there were rumors that all the employees had not been allowed to vote and that he had heard those rumors from other store owners. The first inquiry that Sewell made of the Union concerning the merger vote was during the negotiations for a new contract for Stores 103, 187, and 189. All three stores withdrew recognition from the Union on November 8, 1982. Subsequent to the withdrawal of recognition, a pay raise was granted to the meat department employees of all three stores after the anniversary date as Sewell contended raises were normally granted

each year. The meat wrappers received a 40 to 50-cent per hour raise, the apprentice meat cutters' raise was varied, the meat cutters' received 75-cents per hour, the meat market manager or head meat cutter received $1 per hour raise. Raises were discussed between Sewell and Dan Allen and with the store managers as they wanted to stay competitive and they decided on their own in attempting to determine what the Union would get in its contracts with Kroger and Montesi, two other retail grocery stores in the area. Sewell is certain that the question of the merger came up in discussions with Malone and Hyde, but he is not sure whether he talked to anyone in Malone and Hyde. He did not talk to Jones, the personnel manager of Malone and Hyde, with respect to the merger.

The parties stipulated that in November 1982, all three Big Star Stores gave raises to the meat department employees without discussing these raises or giving notice thereof to Local 1529 with the opportunity to bargain with Local 1529. Sewell acknowledged that he had received a letter from Local 1529's President Leon Sheppard dated May 18, 1983, informing him that Local 452 had merged with Local 1529, and had also received the same letters directed to Stores 103 and 189. Respondents Sewell's Big Star, Sewell-Allen, and Sewell Allen No. 2 responded to these letters sent to Sheppard by Linzy on behalf of each of the stores with respect to the insurance premium question. At the time of the discussion of the increase in insurance premiums after the merger in April 1982, Sewell received grievances filed by the Union concerning Store No. 103. He also received letters from Sheppard requesting information on behalf of Local 1529 for the upcoming contract negotiations. Sewell did not object to bargaining with Local 1529 in response to the grievances filed by the Union or to the information requested by the Union. General Counsel's Exhibit 20 is a response to the letters for Big Star Store 189 drafted by Linzy dated September 18, 1982. Prior to November 8, 1982, Union representatives were allowed to visit the employees in the meat market of Big Star Stores

Nos. 187, 189, and 103 but were not allowed to do so after November 8, 1982. Since November 1982, Big Star Stores 187, 103, and 189 have not accepted or processed grievances from Local 1529.

Sewell testified further that a wage increase to the meat market employees was announced later in the same week as the letter of November 8, 1982 went out. Sewell talked with Linzy about the wage increases and Linzy informed him of what other stores were giving to their employees. Allen had also received information from Linzy with respect to what raises the Giant and Pic-Pac food chains were giving to their employees. After meeting with Mancini in October, Sewell confirmed that some members of the Union had not been allowed to vote. Sewell attended a meeting of store owners at the Malone and Hyde offices or warehouse which was held by Linzy in the spring of 1982 with respect to the issues of whether the stores would bargain as a group or as individuals. Sewell and Allen decided to negotiate their labor agreements separately from the group. There was no discussion at this spring 1982 meeting with respect to the merger. Sewell also attended a meeting in November among store owners and Linzy prior to November 8. This meeting concerned the merger and Linzy told them that the merger between Local 452 and Local 1529 was illegal.

Dan Allen, the co-owner of Sewell-Allen and Sewell-Allen No. 2, testified as follows. In April 1982, he received a letter informing him that Locals 452 and 1529 had merged. He is not denying that he received the letter but he does not remember it specifically. He did not raise any objections to the merger at the time he learned of it in April 1982. He, subsequently, met with Local 1529 at Local 1529's offices. In July 1982, he received a letter from Local 1529 requesting information and requesting to negotiate over a new contract. He attempted to get the information for the Union (G.C. Exhs. 18(a) and (b)). He initially heard rumors from an employee at Big Star 162, a store which he owns individually, in the latter part of September 1982 who

told him that all of the employees had not been allowed to vote. A week or so afterward, his brother, Gilbert Allen, told him that his employees had informed him that they had no opportunity to vote on the merger issue. He discussed this information with his attorney Linzy, the first of October. He attended a negotiation meeting on behalf of Stores 103 and 189 with Mancini on October 13, 1982. He acknowledged that in his affidavit he had stated that he had heard rumors initially of an impropriety in the vote from other owners in August 1982 and that he had not mentioned that he had heard rumors from other employees. Allen testified that he waited until negotiations to raise the issue with Mancini on the advice of his attorney who told him to ask Mancini about it in negotiations. At the meeting of October 13, 1982, Allen informed Union representatives that there would be no negotiations with respect to Store 103 because a decertification petition had been filed. At this meeting, Sewell told the Union representatives that he would discuss Store 187 in order to save time as well as Store 189 rather than to discuss them at separate times. Allen met at a general meeting with all employees of Big Star Stores 103, 187, and 189 on November 11, 1982, and told them that they (Sewell and Allen) no longer recognized Local 1529 as the collective bargaining representative of the meat department employees. A day or so prior, Sewell and Allen met with the meat department employees and told them they would receive a wage increase as Sewell and Allen would be competitive with other stores. Allen and Sewell did not discuss the proposed raise with any other store owners. Allen attended the meeting at the Malone and Hyde warehouse held by Linzy a day or so before the November 8 letters were sent, and Linzy brought the store owners up to date on the merger and informed them of the *Amoco* case. Some of the owners chose to continue to recognize Local 1529 and others did not. Allen has never had any discussions with personnel representative Jones of Malone and Hyde or with LaRue the division manager of the Giant stores or with Creech the division manager of the Pic-Pac stores or with Hyde the chairman of Malone and

Hyde or with any other Malone and Hyde representative with respect to the merger nor with respect to the wage increase granted in November 1982 to his stores.

Al Baker, the president of Bakers, testified as follows: He received a letter with respect to the merger of Local 452 and Local 1529 in April 1982. He continued to follow the contract wit Local 452, he raised no objections to the merger, but continued to deal with Mancini, continued to make payments to the Union's health and welfare fund, the Union's pension fund, and to make dues deductions to the Union. After notification of the merger, he was aware that he was dealing with Local 1529 rather than Local 452. In May 1982, a question with respect to the amount of the contribution to the health and welfare fund came up, and he received a letter from Local 1529 requesting an increase in payments which he sent to his attorney, Linzy, who prepared a response. He also received a letter from Local 1529's President Sheppard requesting information to bargain dated September 17, 1982. Bakers stores continued to process Union grievances with the Union. On November 8, 1982, he directed a letter to Local 1529 informing them that Bakers would no longer recognize it as the collective bargaining representative of its meat department employees. After the expiration of the labor agreement on October 31, 1982, Bakers granted wage increases of 50-cents to $1 per hour to head meat cutters, $1 per hour to the journeymen meat cutters, 50-cents an hour to the apprentice meat cutters, and 60-cents an hour to the meat wrappers. He had previously had collective bargaining agreements with Local 452 for a period of 20 years. He made the decision to grant the wage increases along with his brothers, and his son, who share business ownership and responsibility for Bakers. The raises were cleared through Linzy. He recalled asking Linzy what the other stores were giving. Shortly after November 8, he met with his employees and informed them that Bakers would no longer recognize Local 1529 as their collective bargaining representative because there had not been a valid

merger election as all employees had not been allowed to vote. He had received information with respect to the lack of opportunity to vote from various employees that none of the nonunion employees were permitted to vote and that possibly some of the union employees had not been permitted to vote. His first knowledge that the merger might be illegal came the first of October 1982 when he was informed of this by Linzy. He attended meetings in October 1982 when the merger vote was discussed at Malone and Hyde. There were 15 to 18 Big Star owners present. His son and he made the decision to send the November 8 letter. Since November 8, 1982, all four Bakers stores have no longer accepted grievances. In April 1982, he had written letters asking the Union for concessions from a scheduled wage increase on economic grounds. On cross-examination, he testified that he believed the economic outlook overall was better in October as Bakers no longer had an obsolete store and had opened a new store which looked profitable. He, subsequently, testified that he learned the merger vote was illegal from Linzy 3 or 4 days after the meeting with the store owners. Bakers had continued to deduct union dues from April when he was informed of the merger, until he revoked the recognition in November. Bakers has continued to deduct union dues and assessments. Mike Baker, the son of Al Baker, testified that after he received the April 7 letter, he was aware that there had been a merger between Local 452 and Local 1529.

Gilbert Allen testified as follows: In April 1982, he received a notice of a merger between Local 452 and Local 1529, and knew then that the meat department employees would be represented by Local 1529, and he neither objected nor raised any questions concerning the merger at that point. He continued to follow the labor agreement. He continued to make payments to the Union's health and welfare fund and the Union's pension fund. He received a letter from Local 1529's President Sheppard requesting bargaining on a new labor agreement and requesting information in order to bargain. He responded to this on

September 23. He attended a meeting which lasted 10 to 15 minutes along with other independent store owners in October 1982 with Mancini to commence negotiations for a labor agreement. There were eight individual store owners and Mancini and Burris of Local 1529. At the time they left the meeting, they were given a copy of the Union's contract proposal. There was no discussion of the contract at the meeting. He raised no objections to a name change of Local 452 to Local 1529 which was proposed in the labor agreement nor did he object to negotiating with Local 1529 rather than Local 452. There was a meeting of the Big Star owners in November 1982, and Linzy, who is his legal advisor and to whom he sends all his legal correspondence with respect to labor relations. The first knowledge that he had of any difficulties with the merger was from his employees in either June or August 1982 who told him that they had arrived at the merger vote meetings late and were unable to vote in the merger and had not received notice of the merger. He passed on his letter from the Union in April with respect to the merger to his attorney, Linzy. He had heard in several places that all employees were not allowed to vote on the merger. He believes that his brother probably told him of this. He did not talk to other Big Star owners other than his brother with respect to the merger. He initially learned of a question concerning whether the merger was legal at the meeting held at Malone & Hyde's warehouse in the first week in November. He sent a letter on November 8, 1982, whereby he withdrew recognition from Local 1529. This was the first time he had raised any objections to bargaining with Local 1529. The letter was prepared by Linzy at a Malone & Hyde conference room approximately 2 or 3 days prior to mailing it after the general meeting of the owners.

Glen Smithart, the President of SMF testified as follows: Prior to April 1982, Local 452 represented employees in the meat department in five of the six stores of SMF. In April 1982, he was informed of the merger of

Local 452 and Local 1529 by a letter received from Mancini. At the time he received this letter, he did nothing about it. There was no change in the way the labor agreement was administered. He continued to make contributions to the Union's pension fund after his receipt of the letter. He was aware that Sheppard was in charge of Local 1529 prior to April 1982. He received a letter from Sheppard dated July 30, 1982, on behalf of Local 1529 which contained a request to bargain over a new contract and also requested information pursuant to bargaining. He responded to that letter about a month later. There were two responses. He believes he initially responded through his attorney, Linzy, in September and sent Sheppard the information that was requested. He sent this information a second time as Mancini wrote him a letter and asked for it. He had received his second letter from Mancini dated October 12, 1982, requesting information. He sent a letter to Sheppard on November 8, 1982, notifying Sheppard that he no longer recognized Local 1529 as a representative of his employees. Prior to that date he had not raised any objections to recognizing or bargaining with Local 1529. Prior to this time, he had also engaged in discussions with Mancini about setting a date to discuss the new labor agreement and had not at that time mentioned any problems to Mancini concerning the merger. Some time after that discussion, he did set a specific date to meet with Mancini in early October but called Mancini and cancelled that meeting because his wife was ill.

Smithart testified further that SMF gave a wage increase to its meat department employees between November 20 and 24, 1982. This raise was given to the employees in the meat department only. He gave the same percentage to his head meat cutters, journeymen meat cutters, and to his apprentices. He made the decision to give a wage increase on November 17. The other people involved in the decision were his two partners in business. He also discussed the raise with Linzy. He did not discuss it with anyone else. About a week or two prior to November 19, he

told his employees that he no longer recognized the Union as their collective bargaining representative. He had a meeting of all meat department employees in his office and told them that the merger of Locals 452 and 1529 was illegal and that SMF had discussed the matter with its attorneys, and the decision had been made to refuse to recognize Local 1529 as he had been informed by his attorney that he might be violating the law if he continued to recognize Local 1529. To the best of his knowledge, he told the employees there would be no change in benefits or any other terms and conditions of employment, and that SMF would do what it could with respect to pay raises to improve the contract. He told the employees that normally at this time of year there is a pay raise and he would look into it. He did not discuss any of their other benefits. He received a grievance letter from Mancini dated December 10, 1982, and responded to that grievance with a letter whereby he refused to accept any grievances filed with his company by Local 1529. Since November 8, 1982, he has refused to accept any grievances filed with his company by Local 1529. After he received the letter of April 1982, he had heard that some of their employees had not been given an opportunity to vote on the merger. He heard this initially sometime in the late summer or early fall, and he believes he heard it second hand through one of his partners who supervises the meat department. He believes he discussed the merger with Linzy and probably some of the other store owners after they had a meeting. He thinks this meeting occurred sometime in October. The meeting was held at Malone & Hyde's warehouse. Smithart testified that he did not talk to anyone from Malone & Hyde concerning Local 1529 after the first of April 1982 nor did anyone from Malone & Hyde talk to him about Local 1529 or Local 452, nor did he talk to anyone from Malone & Hyde about a merger. All prior labor agreements had provided for wage increases. Smithart has had responsibility for labor relations matters since the time of inception of SMF. His initial discussion concerning difficulties with the merger vote between Local 1529 and Local 452 was either the latter part

of October or the first of November with Linzy. After that conversation, he made a decision to refuse to bargain with Local 1529. He has had no communications from anyone connected with Malone & Hyde concerning the merger of Local 452 and Local 1529 or concerning the wage increase which he granted in November 1982. When he granted the wage increase in November 1982, he was aware at that time that Giant and Pic-Pac were also granting increases as he had talked to Linzy concerning this. After Linzy discussed this with him, he waited to talk to his partners and they made their own decision about what they were going to do.

Thomas A. Faulk, who is one of the owners of SMF along with Smithart and Miller, testified as follows: He was aware in April 1982 that Local 452 and Local 1529 of the United Food and Commercial Workers had merged. One employee told him that when he had gone to the merger election, he was told that the decision had already been made, and that although he could vote, it had already been determined that the Unions would merge. Faulk informed his partners, Smithart and Miller, of this information.

Joseph R. Hyde, the president of Malone & Hyde testified as follows: There is no connection between services rendered to independent supermarket owners and the company's operations. There are completely different reporting structures. The Memphis Wholesale Grocery Division is one of 10 food distribution centers. Individual store owners may purchase one or all services of Malone & Hyde as with any product. It is a voluntary food group which they are members of and select services bought from Malone & Hyde. Malone & Hyde owns rights to the name, Big Star, on a territorial basis. The only agreement with respect to the use of the name concerns joint advertising under that name with individual operators. There is an agreeement between individual operators and Malone & Hyde as far as advertising under that name. He is not certain whether there is a written agreement. A similar relationship exists with respect to the use of the name,

Food Rite. He is also not certain whether there is a written understanding or not. To his knowledge, there are no grocery supply agreements of any type between Malone & Hyde or any of its subsidiaries or any of the Respondents in this case, nor have there been such agreements in the last 5 years. The relationship between Malone & Hyde and independent operators are based on mutual trust built from the success of the business and he believes there may be a written document that describes advertising services and accounting services. Most of the documents are not signed by the parties but are merely descriptions of the services available which Malone & Hyde attempts to sell to the operators. In most instances, nothing is signed. If they accept the accounting services from Malone & Hyde, for example, they agree to a certain arrangement under which that is to be done.

John Paul Jones, the personnel director for Malone & Hyde which also includes responsibility as director of personnel for the Giant and Pic-Pac stores testified as follows: He is the individual responsible for labor relations for Giant and Pic-Pac. He gives the Giant and Pic-Pac divisions advice and counsel on matters concerning labor relations, negotiation policy, and everything except the day-to-day routine matters. He deals with the manager of the Giant profit center who is John LaRue and the manager of the Pic-Pac profit center who is Bill Creech. It is the practice of Giant Food and Pic-Pac Foods to refer to him questions of concern involving the Union. In the past, grievances that were not settled at the store level and contract negotiations, and discrimination charges were referred to Jones.

Jones initially became aware that Locals 452 and 1529 had merged in the early summer, probably May or June 1982. Between April and October 1982, both Giant and Pic-Pac continued to remit dues payment to the Union. They also continued to make payments under the insurance programs that were contained in the union contracts for

the respective departments and stores. Giant and Pic-Pac continued to accept grievances and respond to them between April and October 1982. Local 1529's reopener letters for the four labor agreements were referred to Jones by LaRue and Creech. These are the contracts for the grocery and meat departments for Giant and Pic-Pac. These letters also contained a request for information received from the Union. Jones commenced collecting the data that was requested at the time he received these letters. When Jones initially learned that the two Unions had merged in early summer, it was brought to his attention as Pic-Pac and Giant began to get a number of written grievances on Local 1529's stationery. They continued to handle these grievances. Jones had been aware since 1980 that there was to be a merger between the two locals, but was unaware that the merger had been effected until his receipt of the grievances. When he was told the grievances were on Local 1529's letterhead, he took no additional steps to find out anything concerning the merger as he had known that the merger was going to take place and he accepted the fact. He did not object to the merger. Jones prepared the information requested in the letters directed to him by the Union requesting information to bargain and he had a meeting with Mancini and another Union representative and allowed them to look at the information in September or early October. The information was not in the form that had been requested. He does not recall whether he actually turned the information over to them at that time.

He initially raised a question concerning the merger when he met with the Union on October 21, 1982, for the purpose of the Union's presentation to Pic-Pac's grocery department of the Union's proposal. Present at that meeting were Jones, Bill Creech, Mike Mancini, John Gorlea, Bill Smith, and another individual. On that date, Jones attempted to clarify at the meeting who he was dealing with, Local 452 or Local 1529. He raised several questions at this meeting as he did not want to do anything illegal. He had previously had meetings concerning two of

these contracts and had not raised any questions concerning who he was dealing with. At the meeting on October 21, he informed Mancini that he could no longer negotiate with the Union until his questions regarding the merger were resolved. The basis for his first doubt on October 20, was a telephone conversation from his attorney Linzy on that date wherein he was informed that there had been a conversation between Mancini and Dan Allen to the effect that all employees covered by the collective bargaining agreement were not allowed to vote on the merger.

Jones testified further that Giant Food no longer recognizes Local 1529 as the bargaining representative of its employees in its meat or grocery departments. Nor does Pic-Pac Foods recognize Local 1529 as the collective bargaining representative of its employees in its meat department or grocery department. He initiated an investigation 2 or 3 days after his meeting with Mancini, and asked the managers of the store operations, Creech and LaRue, and possibly some individual store managers to question the employees and obtain answers to the questions he had asked the Union to answer concerning the merger. Creech and LaRue reported back to him that their employees had not received notices of meetings for the purpose of merging the two unions and that meetings were held at such times that it was impossible for employees working in a 24-hour operation to attend the meetings, and that there were certain employees who had been at the meetings but had not been allowed to vote. It was his decision that Giant and Pic-Pac would no longer recognize Local 1529. There were meetings held in early November or late October in which employees were informed of this action. The decision was also made to continue to withhold dues from employees' paychecks. Since late October or early November, employees dues have been withheld from their paychecks even though Local 1529 is no longer recognized by Giant or Pic-Pac. Additionally, a special union assessment was withheld from employees' checks in December 1982. These dues and assessments have not been

remitted to the Union, but the money has been deposited in a separate account. He informed Sheppard in a letter that if the Union won the litigation, it would receive the money, and if it lost the litigation, the money would be returned to the employees with interest.

Jones testified further that employees at Giant and Pic-Pac were given a pay raise which became effective the middle of November. All employees within each particular classification received the same amount for each classification. Head meat cutters received 70 cents an hour, journeymen received 70 cents at the top of their classification and 20 cents at the bottom of their classification. He did not recall what wrappers or checkers or stockers received. The decision to grant the wage increases was made in early November by Jones and Peter Formanack, a vice president of Malone & Hyde, and by Bill Creech and John LaRue. Jones checked with other companies as to what they were paying in increases and the amount of the increase. He also considered retail service labor reports and similar resource materials. Giant and Pic-Pac also initiated on behalf of their employees in the grocery department, a pension plan in November 1982. Prior to November 1982, the employees in the grocery departments at Giant and Pic-Pac had not had a pension program. The decision to implement the program was made by Jones, Formanack, Creech, and LaRue. They had been considering the pension plan for years but they had decided to do it in early November and decided to implement the plan after they had their converstion with Gorlea and Mancini. The withdrawal of recognition was the result of the investigation conducted among the employees. There had been prior negotiations with the Union for the pension plan for some employees but no agreement had been reached. Prior to withdrawal of recognition of Local 1529, Giant Foods and Pic-Pac had permitted Union representatives access into the stores to conduct union business. Since the withdrawal of recognition, Union representatives are permitted in the stores but are no longer permitted to interfere with the work of

employees.

It is undisputed that the insurance carrier was unilaterally changed for the employees in the meat department of Giant and Pic-Pac from a Meat Cutter's Health and Welfare Plan to a Blue Cross/Blue Shield Plan after November 8, 1982, and Jones also testified that a new notice of a vacation policy was placed in effect for Giant Foods employees after November 8, 1982. Jones testified that the pension plan was implemented without notice to the Union. The policy with respect to the denial of union access and the wage increase was also implemented without notice to the Union.

Jones also testified that an employee complaint procedure was placed into effect for Giant and Pic-Pac employees November 8. Meetings were held with the employees and copies of benefits information distributions were passed out at meetings of employees commencing on November 8, which meetings were held to bring the employees up to date as to their status.

William Creech, the division manager of Pic-Pac Foods, who is responsible for all aspects of the Pic-Pac operations which includes 10 Pic-Pac stores operated in the Memphis area, testified as follows: He assigns supervisors to handle Pic-Pac's labor relations matters. He became aware in April 1982 that Locals 452 and 1529 had merged. The letter came to his office and he believes he forwarded it to Jones. His office manager would probably have a copy of it. On October 21, 1982, he was present at a negotiation meeting with the Union regarding the Pic-Pac grocery contract. At that meeting, Pic-Pac refused to negotiate with Local 1529 until questions concerning the merger were resolved. Sometime after October 21, Pic-Pac withdrew recognition or refused to recognize and bargain with Local 1529 further. He was not involved in the decision to withdraw recognition. He was consulted by Jones. He received a phone call from Jones informing him that they

were withdrawing recognition from the Union. This occurred 2 to 3 days to a week after the October 21 meeting with the Union. He conducted an investigation into the manner in which Locals 452 and 1529 had merged. This was done after the October 21 meeting with the Union. Individuals were sent out to talk with the employees in the stores and the question was raised by the employees as to how the merger had come about and why they had not been given the opportunity to vote concerning the merger. Questions had been raised by the employees prior to the meetings and afterwards. His supervisor, Keith, reported to him concerning this information after the meeting. He made no written memos or notes he told Jones he thought there was a problem with the merger as the employees had no further conversation with Jones except that less than a week later, Jones informed him that they were not going to recognize Local 1529 at this time. Jones gave him no explanation as to why. Pic-Pac granted wage increases to its employees in the grocery and meat departments in November. The decision to do so was made around November 1, as they were due an annual increase. The increase took effect on November 1. They had known for some time that they were going to give the employees an annual raise. To the best of his recollection, the amount of the raises were decided approximately the latter part of October. Involved in that decision were Jones, Formanack, and Creech. Additionally, the decision to implement a new pension plan for Pic-Pac employees in the grocery department who had not previously been covered by the pension was made in the first part of October. This occurred prior to his conversation with Jones wherein Jones told him that Pic-Pac was withdrawing recognition. He believes Jones made the decision to grant the pension plan as he was informed that the decision had been made. He does not recall being consulted by Jones or anyone else concerning the employer's ability to pay wage increases. He conceded that under the Union's labor agreement which had been in existence through October 1982, wage increases had not always been on an annual basis. Charging Party's Exhibit 26 is a handbook entitled "Pic-Pac Keeps You Smiling." He was told by Jones

what was to be in the booklet. After the October 21 meeting, he met at corporate headquarters with Jones and Formanack and they discussed the amount of the wage increase to be implemented after withdrawing recognition of the Union. Factors utilized in arriving at an increase were primarily job classifications. They did not look at the amount of money Pic-Pac stores were earning or did not discuss Malone & Hyde's profitability. Jones suggested the amount of the raises. Pic-Pac purchases wholesale groceries from Malone & Hyde at the same prices the other independent stores have to pay in the Memphis metropolitan area.

John LaRue, the division manager for Giant Food, testified as follows: He is responsible for the operations of Giant Food stores in the city of Memphis. This responsibility includes the five Giant Food stores in Memphis, and these five stores were covered by contracts with Local 1529. This responsibility includes responsibility for labor relations matters. During the period between April and October, he recognized Local 1529 as the representative of the meat, produce, and grocery department employees. In the course of dealing with Local 452 and subsequently Local 1529, he has received communications. He received a copy of Local 1529's letter dated April 7, informing him that Local 452 and Local 1529 had merged. He also handled grievances received from Local 1529. In his position, he has approved wage increases granted to employees and was consulted concerning increases and changes in employee benefits. He was also involved in contract negotiations and was present at negotiations. When he received the letter of April 7, he gave it to his office manager. Jones was his consultant at Malone & Hyde. He received the April 7 letter informing him of the merger. He discussed it with his office manager and told the office manager to do what the letter requested. He was aware from that time on that Local 1529 was representing the employees rather than Local 452. He was also aware that Sheppard was the chief officer of Local 1529. He does not recall whether he brought any of this

information to the attention of of Jones, and as far as he remembers, he did not do so; he might have discussed the merger with the supervisors. Giant Foods or Malone & Hyde did not raise any objections to Local 1529 in April 1982. Giant Food continued to accept grievances from Local 1529 and to process those grievances and made dues payments to Local 1529, and continued to make health and welfare payments under the contract after he received the April 7 letter. Insurance payments that had been made to Local 452 prior to April were thereafter made to Local 1529. In October 1982, he met with Local 1529 concerning the contract for the meat department of Giant. After that meeting, Giant Food refused to recognize Local 1529 as a representative of its employees. He was not consulted concerning the decision to withdraw recognition, but was informed of the decision sometime in the early part of November by Jones who told him that as a result of the irregularities in the merger, Giant would not longer recognize Local 1529. He believes he first learned of the irregularities regarding the merger in the latter part of October. He was informed of this by Jones who stated that they would not deal with the Union at the present time until they checked out the possibilities of the irregularities in the merger of the Union. To his knowledge, he did not conduct an investigation into these irregularities. Shortly after withdrawing recognition, Giant Food gave wage increases to its employees. He was in the meeting concerning the decision to grant wage increases. He believes also that Jones, Creech, Peter Formanack, and a Charlie Shade who was then in charge of retail grocery sales were in that meeting. This meeting was held after he had been informed of the decision to withdraw from the Union. The institution of a new grievance procedure was also discussed in this meeting as was the printing of an employee benefit booklet and the pension plan for grocery employees. He does not recall any discussion concerning the insurance carrier for the meat department employees. This was not the first time there had been a discussion of instituting a pension plan for employees. Since November 1982, Giant has

refused to accept any grievances from Local 1529. A notice of the vacation policy was also posted. The vacation policy contained in the notice (G.C.Exh. 76) has actually been in effect for about 2 years.

It was stipulated that wage increases at Sewell-Allen Big Star 103, Sewell-Allen Big Star 189, and Sewell's Big Star 187 were made effective November 1, 1982, and that on or about November 1982, Respondents Giant and Pic-Pac each instituted wage increases in the grocery departments in the following amounts given to each employee within the following classifications: For sackers and carry-out employees, front-end, full time, 40 cents; stockers and clerks full time, 65 cents; checker and courtesy booth, checkers and stockers full time, 65 cents; checkers and courtesy booth and checkers and stockers part-time, 40 cents; checkers part time, 50 cents; front-end employees part-time, 20 cents; and produce department employees, 65 cents. Additionally, a stipulation was offered and received that on or about November 1982, Respondents Giant Food and Pic-Pac Foods each instituted wage increases of the following amounts to each employee within the following classifications in the meat department: head meat cutter, $1; journeymen meat cutter, 75 cents; apprentice meat cutter, 65 cents; wrapper clerk, 65 cents. All the amounts listed are hourly amounts.

C. Analysis of the Alleged Refusals to Bargain in Violation of Section 8(a)(5) and (1) of the Act with Respect to Withdrawal of Recognition of the Union by the Respondents in November 1981, and Alleged implementation of Unilateral Changes in Terms and Conditions of Employment

1. The validity of the merger

As a result of recent events, the issues as to whether the merger was invalid on due process grounds and specifically whether the merge between Local 1529 and

Local 452 was invalid because unit employees who were not members of Local 452 were denied the right to vote on the merger issue will be addressed at the outset. This issue has been the principal ground on which Respondents have asserted their withdrawal of recognition and refusal to bargain with Local 1529 as the valid successor of Local 452 in November 1982, in reliance on *Amoco*, supra, wherein the Board held at page 1241,

> Accordingly, we find that, in order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election. Because in this case all unit members have not been accorded these rights, we find that the affiliation was improper and therefore the respondent did not violate Section 8(a)(5) of the Act when it refused to bargain and repudiated the collective bargaining agreement.

At the hearing, the General Conusel and Charging Party contended that the *Amoco* case was not applicable to the instant case which involves the merger of two locals of the same international union rather than an affiliation election. However, in *F. W. Woolworth Company*, 268 NLRB No. 115 (1984), issued by the Board on February 10, 1984, the Board applied the *Amoco* case to a merger situation involving two locals of the same international union, and held that the merger of the two local unions was invalid because bargaining unit employees who were not members of the local union which lost its identity had been denied the right to vote. The Board stated,

> The *Amoco* case involved an election in which nonmembers of the independent were barred from voting on the affiliation with the international. The same principle applies, however, when, as here, there is a merger between two

> locals within the same international union. In both instances, the certified union is replaced by a different entity from that designated by the unit employees. In both cases, a factor of primary importance is whether the affected employees have had an opportunity to pass on the change of representatives. That a merger election involves locals of the same parent union does not diminish the impact of the change on the employees or extinguish the due-process requirement that all employees in the bargaining unit be afforded the opportunity to vote.

By letter of February 22 1984, the General Counsel withdrew its "contentions and positions taken to date to the extent that they are inconsistent with *F. W. Woolworth.*" I, accordingly, find that the issue of the validity of the merger of Local 452 and Local 1529 has been resolved by the Board's decision in *F. W. Woolworth*, supra. As set out previously, in this decision, it is undisputed that bargaining unit employees who were nonmembers of Local 452 were barred from voting at the merger election of Local 452 to decide whether Local 452 should merge with Local 1529. I, therefore, find that the merger election conducted by Local 452 in February 1982 violated due process standards because nonmembers of Local 452 were not permitted to vote. I, accordingly, find that the merger which resulted from the election was invalid. *F. W. Woolworth Company*, supra. I find it unnecessary to make a determination concerning the other challenges to the merger raised by the Respondents.

Remaining for resolution are the issues of whether Respondents should be barred by operation of Section 10(b) of the Act from contesting the validity of the merger as a defense to their November 1982, withdrawal of recognition from Local 1529, and whether Respondents should be estopped from challenging the validity of the merger under

the principles set out in *Knapp-Sherill Company,* 263 NLRB 396 (1982) and recently affirmed in *Knapp-Sherill Company, II,* 268 NLRB No. 114 (1984).

2. The 10(b) Issue and the Estoppel Issue

After a review of all the evidence in this case, I find that Respondents were barred by Section 10(b) of the Act from challenging the validity of the merger of Local 452 and Local 1529 as the basis for their withdrawal of recognition from Local 1529 in November 1982. I also find that the Respondents were estopped from challenging the validity of the merger between Local 452 and Local 1529 in November 1982 shortly after the expiration of their collective bargaining agreements. Although some of the Responndents' representatives initially appeared to be contending at the hearing that they did not have notice of the merger between Local 452 and Local 1529 in April 1982 when pressed on cross-examination, they admitted that they had received or had knowledge of the letter sent by Local 1529 dated April 7, 1982, advising them of the merger between Local 1529 and Local 452 wherein Local 1529 was the surviving union. I credit the testimony of Mancini that he mailed the letters to the Respondents on or about April 7, 1982. It is undisputed that each of the Respondents received a copy of the Union's April 7, 1982, letter. I specifically find herin based on the testimony of Lex Sewell, Dan Allen, Gilbert Allen, Al Baker, Mike Baker, Glenn Smithart, Thomas Faulk, Bill Creech, and John LaRue that each of these individuals received the Union's letter of April 7, 1982, and were aware of the merger in April 1982. *Mark I Tune-Up Centers, Inc.,* 256 NLRB 398 (1981). Each of these individuals had responsibility for labor relations for their organizations, and I find that each of them were supervisors and agents for Respondents within the meaning of Section 2(11) and (13) of the Act.

Specifically, I find that Lex Sewell was a supervisor and agent for Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187 within the meaning of Sections 2(11) and (13) of the Act. I find that Lex Sewell and Dan Allen were supervisors and agents of Sewell-Allen Big Star, Inc., d/b/a Sewell-Allen's Big Star No. 189, and for Sewell-Allen Big Star, Inc. No. 2, d/b/a Sewell-Allen's Big Star No. 103 within the meaning of Sections 2(11) and (13) of the Act. I further find on the basis of the undisputed testimony of Lex Sewell and Dan Allen and on the basis of the testimony of the witnesses who testified at this proceeding concerning the meetings conducted by Sewell and Dan Allen among the employees of Big Star Stores Nos. 187, 189, and 103 that Respondents Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star, Inc. No. 2 have exercised common control and coordination of their labor relations policies and are a single employer. I find that Gilbert Allen was a supervisor and an agent of Gilbert Allen big Star, Inc., d/b/a Big Star No. 142 within the meaning of Sections 2(11) and (13) of the Act. I find that Al Baker and Mike Baker were supervisors and agents of Baker Bros., Inc., d/b/a Bakers Big Star Nos. 31, 61, 64, and 81 within the meaning of Sections 2(11) and (13) of the Act. I find that Glenn Smithart and Thomas Faulkner were supervisors and agents of SMF Management, Inc., d/b/a SMF Food Rite Supermarkets within the meaning of Sections 2(11) and (13) of the Act. I find that Bill Creech was a supervisor and agent of Pic-Pac Foods, Inc., a subsidiary of Malone & Hyde, Inc. within the meaning of Sections 2(11) and (13) of the Act. I find that John LaRue was a supervisor and agent of Giant Foods, Inc., a subsidiary of Malone & Hyde, Inc. within the meaning of Sections 2(11) and (13) of the Act. I further find that John Paul Jones was an agent of Giant and Pic-Pac within the meaning of Section 2(13) of the Act. I further find on the basis of the undisputed evidence of the coordinated approach and commonality of purpose of labor relations of Pic-Pac and Giant Foods as disclosed through testimony of Creech, LaRue, and Jones, that Pic-Pac and Giant are a single employer.

Although there were unlawful solicitations by Respondents Sewell-Allen, Sewel-Allen No. 2, and Bakers to encourage their meat department employees to decertify Local 1529 as the collective bargaining representative of their employees and to otherwise abandon their support for the Union (as will be detailed hereinafter in this decision), each of the Respondents otherwise continued to conduct business as usual with Local 1529 until they commenced bargaining on a succesor labor agreement with Local 1529 in October 1982. The evidence shows that there was a coordinated effort among the Respondents in October and November 1982 in seeking to reject Local 1529 as the collective bargaining representative of their employees. However, this effort did not result in actual withdrawal of recognition from Local 1529 as the successor of Local 452 until November 8, 1982, in the case of each of the Respondents. Sewell's Big Star, Sewell-Allen, Sewell-Allen No. 2, Bakers, Gilbert Allen Big Star, and SMF and until December 2, 1982, in the case of Respondents Pic-Pac and Giant. Thus, I find that the withdrawal of recognition from Local 1529 by each of the Respondents occurred more than 6 months after they had notice of the merger of Local 452 and Local 1529. The Board has held in reliance on the Supreme Court's decision in *Local Lodge No. 1424, International Association of Machinists, AFL-CIO (Bryan Manufacturing Company) v. NLRB,* 362 U.S. 411 (1960) that employers are barred by Section 10(b) of the Act from raising as a defense against unfair labor practice allegations of refusal to bargain, attacks against the majority status of the union on the ground that the original recognition which occurred in excess of 6 months prior to the filing of the charges in the case was unlawful. See *Tahoe Nugget, Inc. d/b/a Jim Kelly's Tahoe Nugget,* 227 NLRB 357 (1976), enfd. 584 F.2d 293 (9th Cir. 1978), wherein the Board held in accordance with the *Bryan Manufacturing Company* case that Section 10(b) of the Act was "specifically intended by Congress to apply to agreements with minority unions in order to stabilize bargaining relationships." In cases involving challenges by the employers to

the validity of successorship of one union for another as a defense to Section 8(a)(5) refusal to bargain allegations against the employers, the Board has in *North Brothers Ford, Inc.*, 220 NLRB 1021 (1975) and in *Joe Costa Trucking*, 238 NLRB 1516 (1979), enfd. 631 F.2d 604 (9th Cir. 1980), held that the employers were barred by Section 10(b) of the Act from challenging the validity of the successorship of the surviving union as they had not raised the challenges until after the expiration of the Section 10(b) period. I thus find that each of the Respondents were barred from asserting the Union's lack of majority status as a defense to the refusal to bargain charges in 50 the instant case.

I also find that Respondents are estopped from attacking the validity of the succership of Local 1529 because they waited until November 1982 to do so after the expiration of the collective bargaining agreement on October 31, 1982, and after having dealt with Local 1529 since April 1982. It is clear that Respondents were each on notice that the membership of Local 452 had voted to approve a merger between Local 452 and Local 1529 by the April 7, 1982, letter sent to them by Local 1529. Although that notice did not state in negative terms that nonmembers had not been permitted to vote, it did state that the vote had been by the "membership." Respondents continued business as usual with Local 1529 during the summer and fall of 1982. In fact, some of the Respondents, Sewell's Big Star, Sewell-Allen, Sewell-Allen No. 2, and Bakers engaged in collective bargaining with Local 1529 in June 1982 concerning a mid-term contract modification at which they were represented by their attorney, Howard S. Linzy. No Respondent raised any questions of the majority status of Local 1529 at the time that Local 1529's President Sheppard issued a letter in July 1982, requesting bargaining on successor contracts to the then existing labor agreements between the Respondents and Local 452 which were scheduled to expire on October 31, 1982. Respondents Pic-Pac and Giant commenced to colect information requested by Sheppard for bargaining purposes in August 1982.

Respondents Gilbert Allen, Sewell's Big Star, Sewell-Allen, Sewell-Allen No.2 , Pic-Pac, and Giant attended bargaining sessions with Local 1529's representatives. Although at one of these bargaining sessions Dan Allen reised questions concerning whether nonmembers had been permitted to vote on the merger, and on October 13, 1982, Pic-Pac and Giant's personal representative John Paul Jones raised questions as to whether members and non members of the Union had been permitted to vote and refused to bargain further until the issue was resolved, these Respondents did not withdraw recognition from Local 1529 until after the expiration of their labor agreements on October 31, 1982. Moreover, the evidence is substantial in this case that each of the Respondents were on notice of the purported infirmities in the merger process, and had been advised of the possible application of the *Amoco* case to this issue at least by September and October 1982. However, no action was taken by any of the Respondents to withdraw recognition from Local 1529 until the issuance of the November 8, 1982, letters prepared by Attorney Linzy on behalf of all Respondents except Pic-Pac and Giant both of which issued similar letters to the Union withdrawing recognition on December 2, 1982.

Under the above circumstances, I find that the Respondents were estopped from raising the challenges to recognition of Local 1529 in November and December 1982 under the principles set out by the Board in *Knapp-Sherill Company,* supra, and as recently affirmed by the Board in *Knapp-Sherill Company, II,* supra. Although I recognize that the length of time delay involved in the *Knapp-Sherill* case was substantially longer than in this case, and that the Board cited the extensive correspondence between the employer and the union in the *Knapp-Sherill* case including a hold-harmless agreement which had been executed by the Union to satisfy the employer's concerns in the *Knapp-Sherill* case as evidence of the conscious waiver of the employer of its right to contest the validity of the merger in the that case, I find that the Respondents in the instant

case, nonetheless had sufficient notice of the members only vote by virtue of the April 7, 1982, notice sent to them by Local 1529 and specifically considered the consequences of the merger process in view of the Board's *Amoco* case in October 1982, and in view of their acquired knowledge from discussions among themselves and their attorney, Howard Linzy. Thus, Respondents had ample time to take action to withdraw recognition from local 1529 whch could have permitted it to rectify any obligation to the merger vote in this case but Respondents waited until the collective bargaining agreement had expired to do so at which time they took unified action through the use of virtually identical letters refusing to recognize and bargain further with Local 1529 and put in place a series of unilateral changes which I find were designed to take advantage of the Union's displacement during the critical time of contract negotiations for a new labor agreement. In making this determination, I find that the Respondents did not act in isolation in their withdrawal of recognition from the Union but rather the evidence is clear that they were kept apprised of what actions the other Respodents were taking with respect to bargaining and the granting of wages as well as other actions in conjunction with their rejection of the Union, and were part of an overall coordinated rejection of the union. The common relationship the independents shared with each other was their association with their distributor Malone & Hyde and the utilization of a shared meeting place at Malone & Hyde's facilities, the same labor relations counsel and payment for said services from a common escrow fund maintained by Malone & Hyde into which the Respondents paid for these legal services. Although no impropriety is attached to the existence of this arrangement, it is clear that these Respondents did not operate in a vaccum in making their determination with respect to their course of action in rejecting the Union. It is also clear that the rejection of the Union by Pic-Pac and Giant, two subsidiaries of Malone & Hyde, was closely tailored to the rejection of the Union by the independents as demonstrated by the testimony of Malone & Hyde's Personnel Manager

Jones who was kept apprised of the situation with respect to the "independents" by Linzy. I find that the evidence is sufficient in this case to warrant the inference that the timing of the withdrawal of recognition from the Union at this critical point was part and parcel of the Respondents' overall attempt to dislodge the Union as the collective bargaining representative of their employees. Local 1529 was thus placed in the position of reliance, to its detriment, on the continued recognition by the Respondents until the labor agreement had expired at a time when Local 1529's role as collective bargaining representative was most essential to Respondents' employees, and at a time when its status as the collective bargaining representative of Respondents' employees was most vulnerable. I, thus, find that Respondents did not act in good faith in this case in withdrawing recognition from Local 1529 in November 1982, and that they waived any rights that they had to contest the validity of the merger and are each estopped from now challenging the representational status of Local 1529 as the collective bargaining representative of their employees. Furthemore, I have also considered the overall lack of good faith by Respondents Sewell-Allen Big Star, Inc., Sewell-Allen Big Star, Inc. No. 2, Bakers Bros. Big Star, Inc., Giant Foods, Inc., and Pic-Pac, Inc., in the context of their commission of various unfair labor practices as found in this decision and that their withdrawal of recognition and refusal to bargain did not occur in a context free of unfair labor practices. Accordingly, I find that by their withdrawal of recognition and the refusal to bargain with Local 1529, each of the Respondents violated Section 8(a)(5) and (1) of the Act.

D. Allegations of Independent Violations Against Sewell-Allen Big Star, Inc. d/b/a Big Star No. 189 and Sewell-Allen Big Star, Inc. No. 2 d/b/a Big Star No. 103

1. A Preliminary Issue—The Supervisory Status of Clifford Phillips

Johnnie Worrell, a journeyman meat cutter at the time of the hearing, testified that prior to August 1982, he was employed as head meat cutter in the meat department at Big Star No. 103 and reported to Clifford Phillips who was his supervisor. Worrell was a member of the bargaining unit as a head meat cutter. As a supervisor, Phillips spent 100 percent of his time in the meat department, made out work schedules, and told employees what meat to cut and inspected the employees' work. Prior to August 1982, Phillips assigned overtime to the employees. Phillips did not punch a time clock as did Worrell and other employees in the meat department. Several other employees assigned to the Big Star No. 103 meat market also testified concerning the performance by Phillips of various supervisory duties such as the assignment of overtime to complete work, making out of work schedules, approval of vacation and holiday requests, inspections of the employees' work, and correction of their mistakes on the job, authorization of refunds or credits and exchanges to customers and the handling of complaints therein, inspection of the meat, and inquiring of employees whether they wished to leave early at such times as the store was not busy. Michael Rowley testified that he was hired by Phillips in March 1981. James Kimbrough, a former journeyman meat cutter at Store No. 103, testified he was interviewed by Phillips in January 1982, and that Phillips asked him to begin work on the following week and later asked him to take a week off and then return to work whereupon Kimbrough then became a full time employee. Theresa Heist, a meat wrapper, also testified that Phillips had interviewed and hired her as an employee.

Phillips was not called as a witness, and the foregoing testimony of the employees is unrebuted. With respect to the supervisory status of Phillips, an inquiry was made of Lex Sewell, co-owner of Sewell-Allen Big Star, Inc. No. 2 d/b/a Big Star No. 103, who testified that Phillips had been the highest ranking employee in the meat department, was salaried until mid-August 1982 at which time he was

demoted to the position of meat market manager and then punched a time clock. As a supervisor, Phillips had received a bonus in accordance with the performance of the meat department. Phillips had not been included in the unit nor had contributions been made on his behalf to the Union's health and welfare and pension funds. Rather, contributions were made on his behalf to company-sponsored plans. Dan Allen, the other owner of Sewell-Allen Big Star, Inc. No. 2 testified in conclusionary language that all of Phillips' duties were routine meat cutter duties and that Phillips did not have the authority to hire, fire, or discipline employees. I find that the specific exercise of supervisory authority by Phillips as set out herein and the undisputed fact that Phillips was the highest ranking employee in the meat department demonstrates that he was a statutory supervisor within the meaning of Section 2(11) of the Act. See *Liberty Markets, Inc.*, 236 NLRB 1486, 1495 (1978).

Worrell testified further in mid-August 1982 that Phillips informed him that he had been demoted from supervisor to head meat cutter. Shortly thereafter, Worrell was himself demoted to a journeyman meat cutter. Worrell testified, however, that neither his duties nor Phillips' duties changed after the title change. Worrell testified concerning his own duties as head meat cutter at Store 103 until the time of his demotion, that he directed and assisted employees during one day a week when Phillips was off work and one week during the vacation of Phillips. He otherwise performed meat cutting duties. I credit Worrell's testimony and find under there circumstances that Phillips was s supervisor within the meaning of the Act at all times relevant herein, including after his demotion to the position of head meat cutter as he continued to exercise supervisory authority. I find also that the limited amount of exercise of supervisory authority accorded to Worrell during the absences of Phillips was not sufficient to make him a statutory supervisor. *Cannonsburg General Hospital Association*, 244 NLRB 899, 900 (1979). I further find that, assuming arguendo, Phillips was not a supervisor within

the meaning of Section 2(11) of the Act, Respondent placed Phillips in a position whereby the emplyees could reasonably believe he was a supervisor and that his participation in the Respondent Sewell-Allen No. 2's campaign to decertify the Union (as will be hereinafter detailed) reflected the antiunion attitude of Respondent Sewell-Allen, Inc. No. 2, and his conduct is properly attributable to Respondent. *American Door Company, Inc.*, 181 NLRB 37 (1970); *NLRB v. Des Moines Food, Inc.*, 296 F.2d 285 (8th Cir. 1961); *Clevenger Logging, Inc.*, 220 NLRB 768 (1975).

2. The June 28, 1982, Conversation Between Phillips and Worrell

Worrell testified that Phillips called him outside of the meat department and stated "I guess you know there have been a lot of changes made at Sewell and Allen Company." And "Well, they want you all to get out of the Union because of the merger of the Union." Worrell testified Phillips also stated "working conditions would be a lot better if we were out of the Union." Worrell informed Phillips that he did not wish to get out of the Union and Phillips told him that Sewell and Allen would then want to talk to him. Phillips also told him that Sewell and Allen "could not work with Leon Sheppard." Sheppard was the president of Local 1529.

I credit Worrell's testimony which was unrebutted as Phillips did not testify at the hearing. I find that the solicitation of Worrell by Phillips to withdraw from the Union on behalf of Respondent and the promise of better working conditions if he did so were violations of Section 8(a)(1) of the Act.

3. The Conversation Between Store Manager Gordon and Worrell

Worrell testified that approximately 2 days later,

Michael Gordon, the store manager of Store No. 103, approached him and told him that he (Gordon) had heard that Worrell wished to talk to him. Worrell told Gordon he had heard that Gordon wished to talk to him. They went to a nearby restaurant and Gordon asked Worrell if he wanted anything, to which Worrell replied, that he did not. Worrell testified that Gordon then went on to discuss Worrell's withdrawing from the Union. Worrell told Gordon he had no plans to get out of the Union. Gordon then went on to tell Worrell that the store would be a lot better if the employees withdrew from the Union and the hospitalization and life insurance benefits would be better, and that "the store" could not work with Leon Sheppard following the merger and that the union dues would go up. Worrell testified that at this time he asked Gordon "what about the rest of the people in the store? Would you talk to them?" And Gordon replied, "No, we are not concerned with the rest of the people." This conversation took place during Worrell's working hours as he had just returned from lunch.

Michael Gordon, the manager of Big Star 103, placed his conversation with Worrell on July 3, at a restaurant next door to the store and acknowledged that it occurred shortly after lunch. Gordon testified that there was confusion as both he and Worrell thought the other individual wished to talk to him. He acknowledged, however, telling Worrell that "they" were concerned about the Union that they were having to deal with now and felt that there were going to be some difficult times with the Union as there had been some threats to the company and possibly they (the Union) would cose the store down and that he wanted Worrell to be aware of that. According to Gordon, Worrell stated he was skeptical of the Retail Clerks as he did not know much about them but had heard unfavorable reports, and that Worrell indicated that he would rather stay with the Union but did not know other employees felt. Gordon denied telling Worrell that he wanted to talk to him about getting out of the Union or that Worrell's hospitalization

and life insuance or any other benefits that the company provided would be better if he withdrew from the Union.

I credit Worrell's testimony over that of Gordon. In making this determination, I have considered my observation of Worrell on the stand. I found Worrell to be a credible witness although as Respondent has pointed out in its brief and at the hearing, Worrell's specific recall of dates of various discussions and events was not precise. However, the various events, including this one, were substantially acknowledged by Respondent's witnesses as having taken place and fall into a pattern whereby Respondent's representatives solicited the withdrawal of support from the Union by its employees. I have also considered the fact that Worrell is currently an employee at Big Star No. 103, and the lack of likelihood that he would take an untruthful position contrary to that of the Respondent, given his status as an employee of Respondent. Moreover, I find Gordon's version of the meeting unlikely, given Gordon's own admissions that he did discuss the Union with Worrell after this alegedly mistaken meeting between the two which followed the prior discussion of Phillips with Worrell whereby Phillips solicited Worrell's withdrawal from Local 1529. I, accordingly, find that Respondent's statements violated Section 8(a)(1) of the Act by its solicitation of Worrell to abandon the Union and the issuance of threats of store closure if employees did not abandon the Union, and the promise of benefits if the employees did abandon the Union.

4. The July 12, 1982, Meeting

Worrell initially testified that this conversation took place approximately June 12, 1982. I find on the basis of other evidence, however, that this conversation took place on or about July 12, 1982. Specifically, Worrell testified that a couple of weeks after the June 28, meeting, he was called to a meeting with store owners Sewell and Allen which took place in the front office of the store. Worrell was

called to the front of the store by Manager Gordon, and Sewell and Allen were in the office and Gordon then left. Allen asked Worrell what kind of future he planned with the company. Worrell did not reply. Allen then went on to tell Worrell that they (Sewell and Allen) wanted to get the employees out of the Union. Worrell replied that he did not want to get out of the Union. Allen then went on to state that they (Sewell and Allen) did not like the merger and wanted the employees to get out of the Union and that it would be better for the whole store and the employees would get better life insurance and hospitalization and retirement without the Union. Worrell testified that during the course of this conversation, he asked Sewell and Allen whether they were willing to give the employees a contract if the employees got out of the Union. Allen state that he did not know, but he would look into it. Worrell further testified that during this meeting, Sewell referred to Firestone Company and International harvester each of which had closed facilities in the Memphis area and asked Worrell whether he saw what the Union had done to there companies, and Worrell further testified that Sewell stated that if he had to open up another store which had a union, he would close it.

Gordon did not testify concerning this incident. Allen acknowledged that he and Sewell had an initial discussion with Worrell which he placed in mid-July, 1982 in the front office of Big Star No. 103. Allen testified that he and Sewell met with Worrell to talk about the merger and problems they thought it would bring in the future and talked to Worrell as he was interested in the effect it would have on his future at Store 103. Accordingly to Allen, Worrell asked if he withdrew from the Union, what benefits he would have concerning pension, vacation days, and days off and that Allen and Sewell told Worrell they had a comparable plan to the Union's pension and health and welfare plans and that the employees would not lose anything in these areas as they (Sewell and Allen) had to pay the going rate in the city of Memphis or they would lose their

employees and therefore they would be competitive as far as wages were concerned. Worrell asked about his vacation, and they told Worrell that the standard vacation procedure would prevail whether they were union or nonunion. Worrell indicated he was interested in doing something about this and wanted to go back to the meat market and talk to some of the other employees and get their opinions, and he (Worrell) would get back to Sewell and Allen. According to Allen, the meeting was very short on that particular day. Allen denied telling Worrell that he wanted him and the other employees to get out of the Union. According to Allen either in this meeting or second meeting, Worrell stated that he had some friends or relatives who had worked at Firestone or International Harvester and referred to the hard times those companies were having and that he was aware of the fact there was a possibility of those plants being closed.

Sewell also acknowledged that he and Allen met with Worrell in mid-July (1982) in the office of Store 103. Sewell testified that he opened the meeting and told Worrell) that there was something important to them (Sewell and Allen) and also to him (Worrell) that they felt would affect the future of Worrell as well as the future of Sewell and Allen and that they wanted to discuss some potential problems that might arise in the fall of 1982 when the present contract with Local 452 expired as it looked like they were going to be dealing with Leon Sheppard and his union instead of Mike Mancini and Johnny Lambert (the former representatives of Local 452) as they had in the past. They feared some difficulty in dealing with Sheppard and problems arising from that and they wanted to inform Worrell of this. According to Sewell, he and Allen told Worrell that there could be problems because Sheppard had a reputation for having strikes, pickets, and that type of thing, and they also told Worrell of a threat that had been made to them by someone representing that union that caused them some concern. Sewell testified that Worrell made the statement that he did not know a lot about the Union but had heard

some things that were not good about the Union and that he had some thoughts about getting out of the Union and if they did not mind, he would ask them a few questions which they agreed to. Allen answered an inquiry by Sewell with respect to the type of benefit programs that would be available to them if they got out of the Union and Told Worrell that if anyone withdrew from the Union, they would not lose anything. Sewell denied that either he or Allen at any time told Worrell that they wanted him to get out of the Union or that they could not work with Leon Sheppard or that if he got out of the Union, the company would provide better hospitalization and life insurance than he currently enjoyed. Sewell testified that the conversation about a contract with Worrell came up in one of the meetings with Worrell, but that he was not sure whether it was this meeting or a subsequent meeting. Sewell testified he told Worrell it would be illegal for them to give the employees a written contract as they already had a contract. According to Sewell, Worrell brought the subject of Firestone or International Harvester up and noted that employes ought to be thankful if they had a good job as he (Worrell) had friends or relatives employed at one or another of these organizations who were worried about their jobs. Worrell stated he would like to think about getting out of the Union and would like to get back with Sewell and Allen after he had had time to think about it and that he wanted to talk to some other employees about it.

I credit the testimony of Worrell. It is undisputed that Sewell and Allen initiated this meeting and brought up the subject of their perceived difficulty in dealing with Local 1529, and made it clear to Worrell that he could do better or at least as well without the Union, and their desire that he withdraw from the Union. I thus find that Respondent Sewell-Allen, Inc., No. 2 violated Section 8(a)(1) of the Act by soliciting Worrell's withdrawal from Local 1529, and by indicating that they would be unable to deal with Sheppard which is an anticipatory refusal to bargain. Moreover, I find that Allen's initial question to Worrell as

to the type of future he planned with the Company was also a violation of Section 8(a)(1) of the Act as this was clearly an unspecified threat that his future could be endangered if he continued to support the Union, particularly in light of Allen's statement that he wanted the employees out of the Union. I further find that Respondent's references to being competitive with other employers and that the employees could not lose anything were promises of wages and benefit increases without the necessity of belonging to the Union, and that Respondent also violated Section 8(a)(1) of the Act, thereby. I further find that Sewell's statement concerning Firestone and International Harvester and their possible plant closures as well as his statement that if he had a union in another store, he would close it, were clear threats that Big Star No. 103 might be closed if the employees, and specifically Worrell, remained in the Union, and were also violations of Section 8(a)(1) of the Act. I find that the statements that Sheppard had a reputation for strikes was also an unlawful threat and a violation of Section 8(a)(1) of the Act.

5. The Meeting of July 26, 1982

Worrell testified that he had a subsequent meeting with Sewell and Allen approximately 2 weeks after the initial meeting with them. This meeting also took place in the front office of the store. At that time, Allen asked Worrell whether he had changed his mind about getting out of the Union. Worrell replied that he had not, and planned on staying in the Union because "it is better for me and my family." Sewell and Allen told Worrell that they would give the employes better benefits than the Union had and that anything the Union had, they had something better as far as life insurance and hospitalization and they would take the $8 per month that was currently paid into the Union's pension fund and put it into an IRA for the employees. They further stated they could not work with Leon Sheppard whereas they had been able to work with Mancini and Lambert. Worrell testified that at that time, he told them

he would get out of the Union.

Allen testified that this meeting with Worrell took place about a week after the initial meeting and that Worrell told Allen and Sewell that he had talked to some of the other employees and would like to get back with them so they went up to the front office and Worrell told Sewell and Allen that he had some more questions for them. Worrell then asked about the pension plan and they told Worrell they were in the process of preparing a pension plan which would start at the year ending July 1, 1982, but they had not yet decided on the formula. They also talked about an IRA. Worrell again inquired about pay and they emphasized they had to be competitive and in this meeting Worrell asked whether Sewell and Allen would sign a contract with him. Sewell told him they could not do that because they were already under an agreement and it would be against the law for them to sign another agreement with a group of people. Worrell inquired about working conditions and asked whether the help (number of employees) would be cut and they assured him that working conditions would be the same as they had in the past. At the end of the meeting, Worrell stated he was seriously thinking about getting out of the Union and that some of the other employees in the meat market felt the same way he did. Worrell stated that he would like to get back with the other employees and set up another meeting and have some of the other employees meet with Allen and Sewell as well as himself. Allen denied that he began this meeting by asking Worrell if he had changed his mind about getting out of the Union or that Worrell had stated in that meeting that he intended to stay in the Union because it was better for himself and his family. Allen denied that either he or Sewell offered Worrell better benefits than the Union was providing.

Sewell testified that he and Allen met with Worrell about a week after the initial meeting, and Allen opened the meeting by stating that Worrell had wanted to get back to them and they were in the store today and wanted to talk

to Worrell if he had anything to ask them. At this time Worrell inquired concerning the types of benefit programs such as health and welfare and pensions, and pay rates, that would be available to him if he withdrew from the Union. Allen responded concerning the health and welfare program that they would have for the grocery employees and that if Worrell withdrew from the Union, he would be under the same program as the grocery employees. Allen went into details and told Worrell that it contained a disability provision, dental insurance, eyeglass insurance, and other benefits. According to Sewell, this plan was almost the same as that which the meat department employees then currently had through the Union in accordance with the labor agreement as they had taken the Union's plan and used it as a sample and given it to two or three insurance companies to obtain bids on the cost for a similar plan. Worrell also inquired about the pension plan and Sewell told him there would be a pension plan in effect as of July 2, (1982) for all the store employees but that he could not give him the exact details of what it would be. Worrell asked about holidays, and they told him about personal holidays, and they told him there would be no changes in holidays or vacations. Worrell asked how pay increases would be determined and they responded that pay raises would be granted in accordance with what competitiors (other grocery stores) paid their employees. At the close of this meeting, Worrell stated he had been talking to some of the other employees in the meat market and a number of them were interested in getting out of the Union and asked whether Sewell and Allen would meet with them so they could ask questions directly of Sewell and Allen. Allen responded that they would be glad to meet with the other employees at any time. Neither he nor Allen stated that they would give the employees better benefits if they got rid of the union or better life insurance and hospitalization insurance. Neither he no Allen asked Worrell whether Worrell had changed his mind about getting out of the Union. Neither he nor Allen stated they could not work with Leon Sheppard.

I credit Worrell's testimony, and I find that Respondent Sewell-Allen Inc. No. 2 violated Section 8(a)(1) of the Act by the interrogation of Worrell by Dan Allen and Sewell concerning whether he had decided to get out of the Union at the outset of the meeting. I find that said Respondent also violated Section 8(a)(1) of the Act by the statement of Allen and Sewell that they could not work with Sheppard which constituted a threat of the futility of continuing to be represented by the Union as Respondent would not deal with the Union. I further find that Respondent made an implied promise to Worrell of better benefits, terms and working conditions if the employees chose to no longer be represented by the Union, and that it also thereby violated Section 8(a)(1) of the Act.

6. The Meeting in Late July 1982 between Phillips and Rowley and Shelton

Thomas Shelton, Jr., an apprentice meat cutter at Big Star No. 103, testified that in July or August 1982, he was initially involved in a conversation with his supervisor, Clifford Phillips, and with Michael Rowley, another apprentice meat cutter. This conversation took place in the meat department. At that time, Phillips came in and motioned Rowley and Shelton to the side and stated, "I don't know whether you know it or not, but contract time is coming up, and Mr. Sewell and Mr. Allen want to decertify the union." Phillips then stated, "What they have to offer is better as far as their insurance." Phillips also told them that the retirement plan would be better. Phillips also told them that as soon as Rowley became a journeyman meat cutter, they (Sewell and Allen) would put him on the night shift and also stated that Rowley and Shelton "had not had any say so in the union merger from Local 452 and Local 1529." During the course of this conversation, Shelton asked Phillips if he would put what he had stated in writing, and Phillips stated that "I'm pretty sure they would." Phillips told the employees that the stores would follow the Kroger and Montesi (two other retail grocery store operations in

the area) contracts line for line.

Michael Rowley, an apprentice meat cutter, testified concerning an initial conversation between Phillips and himself and Thomas Shelton in the meat department. Phillips approached the two employees and told them that Sewell and Allen were not rich men as the former owner of this Big Star store had been, and that the economy was bad and that the employees' vote was needed as the contracts were coming up shortly in August and that Sewell and Allen would like for the employees to stand behind them in getting out of the Union. Phillips emphasized that Shelton and Rowley were young, and that they could grow with Sewell and Allen over the years if they voted their way. Phillips also mentioned that a lot of businesses were closing down such as International Harvester and Firestone and that a lot of employees were walking the streets and that they could also be walking the streets later on if something did not happen. Phillips also told them that since they were apprentices and most of their job requirements were to cut chickens, the employer could go to prepacked chicken and they (Shelton and Rowley) could be walking the streets as they would be laid off. After further questioning by the General Counsel, Rowley also recalled that at this meeting Phillips had made a statement that since Rowley was an apprentice and the low man on the totem pole with respect to seniority, he could be subject to less desirable working hours, and that in March 1983, Rowley would become a journeyman meat cutter and the Union required journeymen meat cutters to work on the third shift which commences at 5 p.m., and that Shelton and Rowley could be given some "rotten hours."

I credit the testimony of Shelton and Rowley which is unrebutted as Phillips did not testify at the hearing. Although I recognize some differences of recollection in their testimony, I find their testimony is essentially corroborative particularly with respect to the central theme of the meeting with Phillips that Sewell and Allen wanted

them to withdraw from the Union and Phillips' solicitation of their withdrawal. I found both Shelton and Rowley to be candid and credible witnesses. I, accordingly, find that Respondent violated Section 8(a)(1) of the Act through its agent Phillips by the solicitation of these employees by Phillips to withdraw from the Union by the promise of improved retirement and insurance benefits if they chose to withdraw from the Union and by threatening them with adverse consequences with respect to the selection of hours and loss of employment if they did not withdraw from the Union.

7. The Meeting of Sewell and Allen with Meat Department Employees in Store 103 in Early August 1982

Worrell testified that he attended another meeting in the produce room approximately 2 weeks after his second meeting with Sewell and Allen. Present at this meeting were Herbert Bobbitt, Jim Kimbrough, Clifford Phillips, Mike Gordon, and Sewell and Allen. Bobbitt and Kimbrough were journeymen meat cutters at the time. At this meeting Allen stated that they (Sewell and Allen) had brought the employees there to have a meeting to talk about getting out of the Union. Allen went over the benefits and told them how benefits would be better without the Union and that he could not work with Leon Sheppard. Allen told them that he had run Sheppard out of a previous store. Allen told them that if the employees got out of the Union, they would have better hospitalization, life insurance, and retirement. Worrell asked Allen about working conditions at the store, and Allen told him that the only thing the employees would have to do is their job. Allen asked why the employees needed a union, and Worrell replied he needed the union because they had his retirement, and Allen told him that "your retirement (Union) would be frozen after 10 years."

James Kimbrough testified as follows: Approximately August 2, 1982, Sewell and Allen met with Kimbrough and other employees in the produce room at Big Star No.

103 and discussed their withdrawal from the Union. Present at this meeting were Kimbrough, Sewell, Allen, Phillips, Gordon, Worrell, and Bobbitt. Sewell referred to Leon Sheppard, the Union representative, by an obscene name and stated he would not allow him in his store. Sewell and Allen talked to employees about retirement insurance benefits and getting out of the Union. Sewell stated that they had fought Sheppard to keep him out of the front end of the store, and as a result of the merger with Local 452 and Local 1529, Sheppard was coming in the back door now. (The front end refers to the front area of the store staffed by checkers and stockers whereas the back end refers to the area of the store staffed by meat department personnel.) During that meeting, Sewell and Allen stated that they felt that the Union believed there had to be a meat cutter there at night. Kimbrough agreed with Sewell and Allen that it was not necessary for the store to have a meat cutter there all night and suggested that when negotiations for the contract came up, he believed that the Union would bargain with them concerning this matter. Sewell and Allen stated that they were not going to have the Union, and they would give the employees a chance to think about it and get back with them later.

Bobbitt was not called to testify nor as stated earlier did Phillips testify at the hearing. Gordon who testified was not questioned concerning this meeting.

Sewell testified as follows: This meeting occurred about a week later than the second meeting with Worrell. Present at this meeting were Allen and Sewell, Gordon, Phillips, Worrell, Kimbrough, and Bobbitt. Allen opened the meeting and stated that he and Sewell understood that some of the employees had questions they would like to ask and that was the reason they were there. Kimbrough spoke first and stated they were having problems with the Union situation and would like to ask questions concerning what would happen if they decided to get out of the Union. Kimbrough asked questions about the health and welfare pro-

grams, the pension programs, and the pay raises. Sewell does not recall Bobbitt, Phillips, or Gordon talking in this meeting. He recalls Worrell saying that he wanted to think about this (getting out of the Union) and that he would get back with them. Sewell responded to Kimbrough's questions and told him that they would have the same health and welfare program that other employees in the store had. Allen told Kimbrough that they were looking at a number of pension programs for all employees at the store. Kimbrough was told that wage increases would be determined as in the previous years by considering what competitors (other retail grocery stores) did. Kimbrough stated he wanted to think about it and get back with them. Neither Sewell nor Allen made any statement to the effect that employee benefits would be better without the Union, nor did they state they could not work with Leon Sheppard. He does not recall any discussion about improving working conditions or reducing the number of people in the department. Neither he nor Allen asked any of the employees why they needed a union.

Allen testified as follows: There was a subsequent meeting with Worrell which also included other employees about a week after the second meeting with Worrell. This meeting took place in the produce room of Store 103. Present were Sewell, Allen, Gordon, Phillips, Worrell, Kimbrough, and Bobbitt. Allen started the meeting and told the employees that he understood through Worrell that some of them wanted to ask more questions or to discuss the merger situation. Kimbrough did most of the talking. Phillips said nothing nor did Gordon and Worrell said very little at the meeting. Sewell and Allen told the employees they were there to answer any questions concerning what would happen if the employees got out of the union with respect to the pension plan, health and welfare plan, vacation schedules, working conditions, and gave them the same answers as in a prior meeting with Worrell. Neither Sewell nor Allen offered better vacations or better personal holiday programs to the employees. They might have

talked about International Harvester and Firestone companies in this meeting also. At the end of this meeting, Kimbrough said that the employees would talk it over among themselves and would get back to Sewell and Allen at a later date if they had more questions. Worrell may have asked about working conditions, and they told the employees that working conditions would not change, and that the employee complement would not be reduced to half its current number in response to a question by Worrell. They did not ask Worrell or the assembly of employees at that meeting why they needed a union.

I credit the testimony of employees Worrell and Kimbrough as set out above. I recognize some differences in recall by these employees as to the specific statements made by Sewell and Allen at the meeting. However, their testimony was corroborative as to the essentials of this meeting. I found Worrell and Kimbrough to be credible witnesses. With respect to Sewell and Allen's credibility in this instance, I find that this incident is only one of a series of incidents involving Sewell and Allen wherein they solicited the employes to get out of the Union. I find that Respondent Sewell-Allen Big Star, Inc. No. 2 violated Section 8(a)(1) of the Act by soliciting its employees to withdraw from the Union and by their statements of Sewell and Allen that they were not going to have the Union in the store and would not have Sheppard in the store as these statements clearly conveyed the message expressed to the employees that it would be futile to continue to support the union. I further find that Sewell and Allen's promises to give the employees improvements in pension, health and welfare programs and that they would remain competitive with respect to wages and benefits constituted promises of improvement in wages and benefits to the employees without the necessity of the Union and were violations of Section 8(a)(1) of the Act.

8. **The Mid-August 1982 Meeting of Sewell and Allen with the Employees in the Meat Department at Big Star No. 103**

Worrell testified that approximately 2 weeks after the meeting in the produce room he attended a subsequent meeting along with other employees with Sewell and Allen which was also held in the produce room. At that meeting were employees Kimbrough, Shelton, and Rowley, as well as Sewell, Allen, and Worrell. At this meeting Allen asked the employees if they had changed their minds about getting out of the union and the employees all replied that they had not and were going to stay in the Union. At this time, Kimbrough asked "what would happen if we stayed in the union? What would happen if I stayed in the Union? Worrell testified that either Sewell or Allen stated that if he, Kimbrough, stayed in the Union, his family would be on the street and he would be out of a job. Worrell testified that Kimbrough stated he would remain in the Union. At that point, Worrell was asked if he had anything to say in reply and he did not.

Kimbrough testified that at this meeting Sewell asked everyone if they had had a chance to think about what they had talked about in the previous meeting, and that he would like an answer. Sewell then looked at Kimbrough and Kimbrough told him that he would stay in the Union, and Sewell replied "well, you know what that means," and Kimbrough stated "I guess it means I will be in the union." To which Sewell then replied, "That means whether you will have a job or not." And "You better think about your wife and children." Kimbrough testified further that during this meeting Worrell asked if Sewell and Allen would pay insurance retirement benefits and why the employees should get out of the union if everything would be paid anyway. Sewell replied they could not deal with Sheppard. Kimbrough testified further that employee Rowley asked if the employees got out of the Union, whether seniority would still be followed with respect to layoffs and other matters, and Sewell and Allen stated they could not promise anything but they would try to go by it as close as they could. He did not recall whether Sewell or Allen had made this statement. Kimbrough testified further that either Sewell or Allen stated that if the

employees got out of the Union, they would honor Kroger's contract, and that anything the Kroger employees got, they would get.

Shelton testified that at this meeting Allen asked whether the employees had given any thought to what had been discussed earlier concerning decertification of the Union, and that Sewell stated they were prepared to give the employees a better insurance policy than they had and that whereas the current policy contained a $50,000 limit, their policy would be limitless. Shelton testified that either Sewell or Allen stated the retirement plan they had to offer was better than the existing one and that they would follow the Montesi's and Kroger's (two retail grocery store chains) contracts line for line and were willing to put this in writing. Sewell and Allen asked if there were any questions from the employees, and Kimbrough stood up and stated he was not going to get out of the Union. At that point, Sewell said "Well, Jim, I'm sorry you feel that way, when Christmas you are out on the streets." Kimbrough replied, "Well, that's just how I feel." The employees were then told that this would be the last time they (Sewell and Allen) would be talking to them and that they had 2 weeks before the petition (decertification) went out. During this meeting, Sewell and Allen told the employees they were not able to get along with Sheppard and called him an obscene name.

Rowley testified that the meeting occurred in August approximately 2 or 3 weeks after his initial meeting with Phillips, and that Sewell did most of the talking and stated that it was time to decertify the Union and time was closing in quickly and they needed to decertify soon and that he wanted to know how the employees stood on that situation as to whether they were going to get out of the union. Sewell gave them some examples concerning their pension and what the benefits would be without the Union and told Shelton that by retirement time, he would have $200,000 in his retirement or pension plan, and under the union's pension plan he would not have nearly that amount

of money. He also said that their wages would be the same as Kroger's, that they would not have a contract but that if Kroger got a raise, they in turn would get an equal raise and essentially they would have the same benefits as Kroger employees had. Sewell also stated that he did not agree with the Union's new leader, Leon Sheppard, as he personally didn't like him and called him an obscene name. Sewell said that they would not sign any petition with the Union. He also asked the employees how they stood on the Union, Kimbrough said that he was going to stay with the Union and Sewell said "Well, depends on who you trust if you trust them that don't sign your check or you trust the people who do sign your check," and they were thinking about long-range effects, and that Kimbrough said he was thinking about job security and Sewell said, "Well, I hate to see you walking the street, come December or January."

Sewell testified that this meeting occurred about 2 weeks after the earlier one with the various employees in Big Star No. 103 and was held in the produce room at Big Star No. 103. Allen opened the meeting and asked whether there were any questions and Kimbrough asked them to repeat information concerning the health and welfare program. Sewell replied to this and basically told them what they had told them before about that program. Rowley brought up a complaint that he thought he deserved to be classified in a higher wage rate bracket than that of an apprentice because of his service at the store prior to the purchase of the store by Sewell and Allen. Sewell told him they could not accommondate him on this and he would receive a journeymen rate when it became due. Accoding to Sewell, Mary Armour was also at this meeting but did not say anything. He also does not recall Worrell stating anything at this meeting. Sewell told Kimbrough they were looking at three different pension programs and told them what the options were and picked Shelton to give an example with him regarding the annuity program. Near the end of the meeting, Kimbrough stated he didn't know how the others

felt but he thought for the time being, he wanted to stay in the Union. Sewell responded and said "Well, Jim, that is your prerogative to make that decision if you want to I just hope you know everybody understands that we will be negotiating a contract sometime in October and if we do indeed run into any problems with negotiating a contract with Leon Sheppard and if we can't reach an agreement on the contract, the way Mr. Sheppard has acted in the past, there is no telling what is going to happen," and that he said, "We all may be out on the street after that period," as "he is liable to put pickets around it." Allen told the employees if they had anything else they wanted to ask, to feel free to come to them and there were no other meetings held at this store. He does not recall whether or not Allen began the meeting by saying that it was time to decertify the union or that time was closing out quickly and they needed to decertify it soon. Neither he nor Allen stated that they were not going to have any dealings with Leon Sheppard or were not going to sign an agreement with Leon Sheppard's union. Nor did they ask the employees what their position or standing on the Union was or if they had changed their minds about getting out of the Union. Neither Sewell nor Allen made any statements to Kimbrough or anyone else at that meeting that if they stayed in the Union, the employees would lose their jobs and their families would be out on the streets.

Allen's testimony concerning this meeeting essentially corroborated Sewell's testimony. Allen recalls Sewell making the statement that it would be difficult to deal with Sheppard and could lead to a bad situation if they got to the point where they could not negotiate with him and that it was very likely in that event that they would take some type of economic action which would involve pickets and there could be a strike and you could be out walking the picket line. Neither he nor Sewell stated they would not sign a contract with the Union. Neither he nor Sewell stated that if the employees stayed in the union, their families would be on the streets and they would be out of

a job.

I credit the testimony of the employees as set out above rather than the version of Sewell and Allen. I find that Sewell and Allen did engage in interrogation, solicitation of the employees to withdraw from the Union by their questions as to how they felt on the Union and whether they were willing to get out of the Union and as to their statements that it was now time to decertify the Union or that time was drawing close to do so. These statements were clearly violative of Section 8(a)(1) of the Act. I further find that the statements made by Sewell to the effect that they would not deal with Sheppard or sign a contract with Sheppard were messages to the employees of the futility of continuing to support the Union and were also violative of Section 8(a)(1) of the Act. I further find that the example given of employee Shelton accummulating greater benefits under the employer's proposed pension plan as opposed to the plan currently in effect with the Union was a promise of improved benefits if the employees withdrew from the Union and violative of Section 8(a)(1) of the Act. I also find that the statements that the Respondent would follow the contracts of other retail grocery stores in the area were promises of improvements in wages and benefits without the necessity of the employees' representation by the Union and were also violative of Section 8(a)(1) of the Act. I also find that Respondent violated Section 8(a)(1) of the Act by the stated threat to discharage Kimbrough because of his decision to stay in the Union to the effect that he had better think about his family and that he would be out on the street. See *Weather Tamer, Inc.*, 253 NLRB 293, 304 (1980), enf. in part 767 F.2d 483 (11th Cir. 1982).

9. The Mid-August 1982 Meeting of Sewell and Allen with the Meat Department Employees at Big Star Store No. 189.

William Garland, the head meat cutter at Sewell-Allen Big Star No. 189 in August 1982, testified that he

had meetings and discussions with Sewell and Allen concerning the Union. The first meeting occurred approximately the first of August. Allen called him on the store phone and asked him to come to the main office in the front of the store. He went there and Sewell and Allen were in the office. Allen commenced the conversation referring to the past weeks' sales in the market and told Garland he was doing a good job running the market and hoped that he continued to do a good job. Sewell stated they wanted to talk to him about getting out of the Union. Garland replied he was not interested in getting out of the Union. Sewell said he did not want his answer right then but wanted him to wait and give the answer later. Sewell told him they would give him the same benefits that he now had with the Union. They asked Garland if he would talk to the other employes in the meat department about getting out of the Union and Garland said that he would. Neither Sewell nor Allen said they wanted to talk to him about the merger between Local 1529 and Local 452 nor did they want to talk about any difficulties they foresaw because of the merger between the two unions. He did not tell Sewell or Allen or any other supervisor that he wanted to talk to them about the merger nor that he wanted to talk to them about getting out of the Union nor that he wanted to talk to the other employees in the market about getting out of the Union. He also did not tell Sewell and Allen to talk to the other employees about getting out of the Union.

Allen testified that at the first meeting, Sewell and he got together with Garland to discuss the merger and how they felt it would affect them and the problems they could foresee in dealing with Sheppard and they wanted to talk to Garland and he wanted to talk to them about the situation. Allen testified that after that meeting, Garland requested that he and Sewell go back and talk with other employees in the meat market. Several days later, Garland told Allen he would like to have another meeting with Allen and Sewell and have some of the other employees from the meat department there also. On approximately August 20,

1982, Sewell and Allen met with employees Garland and meat cutters Bobby Thurman and Jim Perry in the meat department at Store 189.

Garland testified that approximately 3 weeks later, there was a second meeting with Sewell and Allen. Present at that meeting were Allen, Sewell, and meat department employees Bobby Thurman, and James Perry in addition to Garland. Allen called the employees on the store phone and asked them to come to the front office. Garland had not requested this meeting with Sewell and Allen, nor had he told Sewell and Allen that any of the employees had questions for them about getting out of the Union. On cross-examination, Garland acknowledged that he had filed a grievance on May 19, 1983 about his discharge from the employer. He denied he had stated he had strong feelings at the second meeting attended by Thurman and Perry that Sheppard's union was responsible for four of his tires being cut when he was employed by Pic-Pac during a dispute between Sheppard's union and the Meat Cutters Union (Local 452) at Pic-Pac in 1981. He denied also having told Sewell at anytime before that meeting about difficulties with Sheppard's union, or that he blamed Sheppard's union for cutting 4 tires on his car. His tires were not cut during the course of that dispute, but one of the tires was deflated. His discussion with Allen concerning his tires was prior to the first meeting in August.

Bobby Thurman testified that on August 20, 1982, during the course of a meeting, initiated by Allen, that Allen and Sewell discussed getting out of the Union with the employees. The discussion took place in the main office over the store area. The conversation was initiated by Allen. Allen asked if Garland had spoken to the employees about decertifying the Union and they nodded their heads that he had done so. Allen then asked whether the employees understood the situation. Thurman then spoke and stated that he was there to listen. Allen then went on to state that he could get the employees better hospitaliza-

tion without the Union and that a lot of money was being spent on their Union health and welfare plan and that he (Allen) did not know where it was going and that as far as he was concerned, it was a rip off. Allen then stated that their retirement was not good and that by the time they were retired, they couldn't get over a couple of hundred dollars and that Allen and Sewell could establish an IRA account and that the employees would realize a greater accummulation of funds with such a plan than with the existing Union plan. Allen gave the employees examples as to how this would work utilizing employee Perry as an example. Allen went on to state that the employees' salaries would be based on what Kroger's employees were paid. Perry asked Allen if he would put this in writing, Allen stated he would be glad to do so after the Union is out but it would be illegal for him to do so at this time and that the employees would have to trust him in the meantime. At this point, Sewell took over and told the employees, he realized they were not responsible for the merger with Local 1529 and for its leadership by Leon Sheppard. Sewell called Sheppard an obscene name and related some past experiences involving Sheppard's prevention of the discharge of employees who had stolen something. Sewell stated they (Sewell and Allen) had always been able to work with Lambert and Mancini but that Lambert was no longer involved and Mancini was on the way out. Sewell did not think there was any way he could sit down and negotiate a contract with Sheppard. Sewell then stated it could very well be that the employees could be out on the streets with picket signs and that the holidays were near and they should think of their families. At that point, Thurman asked whether they could be discharged without a union contract if Sewell and Allen came in upset about something else that did not involve the employees. Sewell stated their jobs would be based on performance and asked whether the employees trusted them. No one replied and Garland spoke up and told Sewell and Allen that he was going to have to take up the meeting with the Union officials. Sewell responded that some of the things that he and Allen had

stated could possibly be construed as illegal and there was a possibility that a lawsuit could be filed. But he hoped that what had been said would go no further than the meeting itself. Allen spoke up and asked the employees to give them a year and if they did not live up to their promises, the employees could reorganize. Sewell and Allen asked if there were any more questions. Thurman spoke up and stated that he wanted to think about it and his answers would be based on the past experiences with store owners over the past 23 years. Sewell and Allen agreed and asked Perry and Perry stated he would think about it. On cross-examination, Thurman acknowledged that at the time of this conversation, Kroger rates were approximately the same as those paid to employees at Sewell-Allen. Thurman also recalled the mention of tires being cut at this meeting but does not recall exactly what was said.

Jim Perry, an apprentice meat cutter employed at Sewell-Allen Big Star No. 189, testified that at the beginning of the meeting Allen asked Thurman, Garland, and Perry if they knew why they were there and they replied they had heard rumors about decertifying the Union. Allen agreed and wanted to know what they thought about it. Allen asked them each how long they had been in the Union. Allen told them he had reviewed the Union's retirement plan and felt his retirement plan would be better for the employees if they withdrew from the Union and utilized Perry as an example to demonstrate the amount he would receive from his contemplated plan. Allen told the employees he did not know where the money was going for the current union plan. Allen stated he would not be able to sign a contract with Sheppard but could have done so with Mancini or Lambert. He felt the employees would be on strike in October or during the holiday season and did not feel he or the employees could afford it. Allen and Sewell asked if there were questions. Perry replied that the hardest thing was to give up a written contract which set out the wages and benefits and asked if Allen was going to ask him to give that up and put his trust in him and he told

Allen that he could not do that. Allen stated he could not give Perry a written contract. Sewell stated he had had other dealings with Sheppard and called him an obscene name and said he could not sign a contract with him. Allen asked the employees to think about decertification, that they still had time before the date for the decertification petition to be turned in and to think about it. Sewell and Allen told the employees they would get back with them but never did so.

Allen testified that he opened this meeting and told Perry and Thurman that he thought they knew why they were there and they said that Garland had already talked to them and they knew they were there to discuss the merger and problems surrounding it. A question and answer period followed where the employees asked questions concerning the pension plan, health and welfare plan and whether they would lose anything if they withdrew from the Union. They also discussed wages and Allen and Sewell told them it was their intention to pay a competitive wage and they realized their wages and benefits needed to be comparable to Kroger. Garland discussed an experience he had with Sheppard who he blamed for having tires cut on his automobile. Allen recalled that he utilized Perry, who was a young man as an example with respect to a pension plan under consideration and showed him what he would get in return for the same amount of money as compared to under the Union's pension plan. He believes the working conditions were also discussed and the employees were assured that working conditions would remain the same. The employees told Allen and Sewell at the end of the meeting that they would think about it and get back with them and let them know if they wanted to talk to them again. Allen received no further contact from them. Allen denied that he at any time offered to provide these employees with additional pay or benefits in order to secure their withdrawal from the Union.

Sewell essentially corroborated Allen's testimony

concerning the meeting. Sewell testified he believes he answered a question with respect to a health and welfare program he and Allen were in the process of putting together which was to be effective September 1, 1983, for all employees in the store. Garland asked about the pension program and Sewell told him that at the present time. There was not a pension program for the grocery employees in the store but one would be established at the end of the corporate year in November and they were looking at a proposal for pension plans and had narrowed it down to three options, an IRA program, an insurance annuity program, and a profit sharing program. Allen utilized Perry as an example of what he would obtain in the future under the annuity type of program. Thurman asked how wage increases would be handled in the future if the employees withdrew from the Union and Sewell replied that as in the past, they would give the same increases as the major competitiors gave and would have to do this in order to retain good employees. Sewell also related the comment by Garland concerning the tires being cut. Sewell testified that at this meeting neither he nor Allen stated that the company could get better hospitalization without the Union and that the only thing that was said with respect to comparing wage increases and Kroger rates was that they would give the employees increases as they had in the past as their competition at Kroger and Montesi's. Neither he nor Allen offered to put into the written contract existing wages and benefits if the Union no longer represented the employees. There was some discussion that it would be difficult dealing with Leon Sheppard. He does not recall, and does not believe, he said there was no way he could sit down and negotiate a contract with Sheppard. He did ask the employees to listen carefully because the meeting could be misconstrued as illegal and that he could make no promises or threats to them and he wanted them to understand that he was not doing that.

I credit the testimony of the employees that Sewell and Allen did in fact interrogate them and promise them

improved benefits particularly with respect to the pension plan and with respect to paying competitive wages in line with major competitors and that Respondent further threatened the employees with the futility of their continued support of the Union as Sewell and Allen would not sign a contract with Sheppard or the Union and also told the employees that it was likely that there could be a strike later in the year if they continued to be represented by the Union. Accordingly, I find that Respondent Sewell-Allen Big Star, Inc., violated Section 8(a)(1) of the Act by unlawfully interrogating the employees at the meetings concerning their union sympathies and solicited their withdrawal from the Union. I find that said Respondent also violated Section 8(a)(1) of the Act by promising improved pension plans through the employer-sponsored plan as opposed to the Union's plan and improved benefits with respect to the health and welfare plan and improved hospitalization benefits, and by promising to keep up with the competition with respect to wage rates in the absence of their representation by the Union. I also find that Respondent violated Section 8(a)(1) of the Act by its statement to the effect that it would be futile to be represented by the Union as Respondent would not negotiate with the Union and would not sign a contract with Sheppard and his union. I further find that Respondent issued an unlawful threat in violation of Section 8(a)(1) of the Act by the statements that the Union was likely to strike later in the year and that the employees could be outwalking the picket lines and they should think of their families at this time.

10. The Meeting Between Fortner and Sewell

Mary Fortner, a meat wrapper at Big Star No. 103 until she was laid off on January 8, 1983, testified that in late August 1982, she had a dispute with Clifford Phillips, her supervisor, regarding arrangements for a personal holiday wherein she was told to take both of her personal holidays at the same time. She raised this question with

Union Representatives Mancini and Bill Smith who came to the store and discussed the contractual provisions concerning personal holidays with Clifford Phillips. The dispute was settled at that time. After Mancini and Smith left the store, she was putting items in the meat case and was approached by Sewell who had asked her if everything was all right. She told him what had happened and she did not understand what had happened. She testified that Sewell then told her that they do not need them (the Union) in the store and asked her to call him regarding any other problems. I credit Fortner's testimony which is unrebutted as Sewell did not testify concerning this incident. I find that Respondent violated Section 8(a)(1) of the Act by telling Fortner that it was no necessary to have union representatives represent her in grievances with the employer and by soliciting her to bring her grievances to him, thus undermining the Union's status as he collective bargaining representative.

11. The Circulation of the Decertification Petition

Leroy Dancer, who at the time of the hearing was employed at Sewell-Allen Store No. 103 as a full time journeyman meat cutter and who had previously been a part-time journeymen meat cutter since December 1977, testified as follows: On July 20, 1982, he was approached by Clifford Phillips in Phillips' office and asked whether he had considered getting out of the Union or would work without the Union. Phillips informed Dancer that he could give Dancer more hours of work as Dancer was then a part-time employee. Dancer agreed that he would be willing to work without the Union or that he would consider it. A few days later, Phillips called Dancer at his home and asked Dancer again whether he would get out of the Union. Dancer told him he would. Subsequently, in August, Dancer was approached by Store Manager Gordon while picking up his paycheck at the front of the store and Gordon told Dancer that he understood that he wanted to get

out of the Union. Gordon then stated that he would tell him what he had to do and then pulled out a piece of paper from his billfold which read "We do not want Local 1529 nor 452 to represent us. We want out." Gordon told him he should get this petition circulated and obtain signatures. Dancer did not reply to this. Gordon told him that he (Dancer) needed to get signatures and specified that Dancer's name should be on the top of the petition and that the wording on the piece of paper should be written on a piece of paper and dated and Phillips' name should be on the bottom. Later that day, Dancer, who worked primarily evening hours had returned to work in the evening and saw a note to call Phillips at home. Before he was able to place a call to Phillips, Phillips called Dancer and told Dancer that Gordon had said to hold up on the petition.

Approximately August 25, Dancer arrived for work and Phillips and Gordon were waiting for him in the office. At that time Dancer was asked whether he was ready to go through with the petition and he replied he was. Then he was told how to proceed and to be at the store on Thursday, August 26, to obtain the signature of John Bevile, a part-time employee, as Bevile would not be working on Friday, August 27. Gordon also took out another piece of paper from his billfold with the address of the Labor Board and stated "you need to take it to this address." Dancer told Gordon that he was getting in a serious situation and did not want to be involved in the petition, that working without the union was one thing but filing a petition was something else and something he did not want to be a part of. Gordon told Dancer that he needed to go through with it. Gordon also told him "Now, remember, this is your idea," which statement Gordon repeated throughout the conversation. Gordon explained the procedure as to how to get Bevile to sign and also to ask Worrell and the other employees to sign the petition and make sure that Phillips was the last employee to sign the petition. At this time, Dancer told Gordon that he had heard rumors that most of the employees would not sign and there was no way you

(Gordon) could win the vote because the majority of the employees would not sign it. Dancer testified that at that point, Gordon called Dancer over to the schedule and said "Well, I want to show you something." "It is even now. These people are no longer with us." Gordon then mentioned Bill Gross, Becky Hordyk, and Theresa Heist. Gross was a part-time meat cutter and the other two employees were part-time meat wrappers. Gordon told Dancer that these employees had been terminated. Gordon again reminded Dancer of the procedure for filing a petition and Dancer told Gordon that he felt he (Dancer) was heading for trouble. Gordon told dancer that he knew what Dancer wanted and Dancer would get it.

The next day, Thursday, August 26, Dancer went to the store early in order to obtain John Bevile's signature on the petition. Dancer was not scheduled to work until that night. Phillips told Dancer that he would telephone his wife who was a part-time employee in the meat department and also his son to come down to the store and sign the petition. Although Dancer had been scheduled to work on Thursday night, he telephoned Phillips and told him he was under stress as a result of his involvement with the petition and would not be able to work his regular schedule. Phillips told Dancer to get some sleep and come in when he could. Dancer came in and reported at the store at 6 a.m. on Friday, August 27. He worked for approximately 1 hour on the clock until 7 a.m. At that point, Phillips told Dancer that whenever he was ready to circulate the petition, to let Phillips know and they would get things rolling. Somewhere between 7 and 8 a.m. Dancer told Phillips he was ready and Dancer went into Phillips' office and placed the petition on the desk. Phillips proceeded to call employees in for the remainder of the morning and told the employees that Dancer wanted to see them at which time dancer would show them the petiton (G.C. Exh. 4) and ask them to sign. Phillips returned to the office to determine how many names Dancer had obtained on the petition. Dancer showed Phillips, and Phillips asked Dancer to take

the petition to Gordon. Dancer took the petition to the front of the store to see Gordon who told Dancer "well, don't show me that in front of the door, let's step over to the side here." The two stepped over to the side of the store in a corner and Gordon inquired whether Dancer had obtained the dates by each name on the petition. Dancer had not done so as a result of a misunderstanding concerning instructions given to him but had merely dated the top of the petition. Gordon then told Dancer that the dates needed to be placed by each name. Dancer then went back to Phillips and told him of this and as some of the employees who had signed the petition were not there at the time, Phillips told Dancer to sign and date the petition himself. Dancer then dated his own signature and Phillips dated the rest of the signatures on the petition. Dancer then returned to the front of the store to Gordon and explained to Gordon that he had heard rumors that he (Dancer) was heading for a lot of trouble and would be blackballed and perhaps not find another job in the city. Gordon assured Dancer that he (Gordon) knew what Dancer needed and would take care of Dancer. Dancer filed the petition with the Board's Regional Office on that date. After he filed the petition, he returned to the store that evening at 7 p.m. and told Phillips that the petition had been filed. Phillips then called Gordon on the intercom and Gordon returned to the office in the rear of the store by the meat market, looked over the petition, and said "Good. This is what we need. Well done, Leroy." Two days later on August 29, a Sunday, between 8 and 9 a.m. Dancer received a telephone call from Phillips who told him that his schedule had been changed and he would be working full time on the night shift. Dancer thereupon became a full time employee the following Monday night. On August 27, although Dancer had worked only 1 hour, he was paid for 6 hours. When Dancer returned to the store on that evening Phillips asked about his expenses and how long he had been involved in preparing the decertification petition. Phillips then took Dancer's time card from the file and asked him whether 6 hours would take care of it to which Dancer replied, "it soulds good" whereupon Phillips

credited him for 6 hours of working time on that date.

On cross-examination, Dancer testified as follows: After he left the store on August 27 to take the petition to the Board's office, he initially went to the Union hall and talked to Union Representatives Mancini and Smith concerning the petition. They told him to go to the Labor Board and give a statement. Dancer reiterated his testimony that Gordon had initiated the decertification petition. Dancer also denied having given Gordon any hints or indications prior to the initial conversation in the latter part of August that he was interested in getting out of the Union. There was a time gap of almost a week between the time Dancer and Gordon initially discussed decertification and the time that Gordon explained to Dancer what was necessary to put on a decertification petition. The meeting with Mancini and Smith at the Union hall prior to filing the petition lasted about 15 to 30 minutes as Dancer explained what had occurred and that he did not want to get involved in the petition and was concerned about various matters including his life insurance and needed some answers. He inquired of Mancini and Smith how this would affect him. Dancer testified that Mancini and Smith told him to tell the truth about the matter and made no assurances to him.

Gordon testified as follows: He initially had a conversation with Dancer concerning decertification of the Union around the first of August. According to Gordon, Dancer stopped him around the meat case and told him that he was interested in getting out of the Union and wanted to know if Gordon could give him any tips on how to file a decertification petition. Gordon stated he did not know but would find out for him as this was the first time there had been any discussion with Dancer concerning decertification. Other conversations followed this initial one concerning decertification. The next conversation took place either a week or 2 weeks after that when Dancer came by the office and asked if Gordon had obtained the information.

Gordon told him he had. Gordon had the information written down in his wallet which contained a statement as to what should be written and that it needed to be signed and dated which information Gordon had obtained from Dan Allen. Gordon told Dancer that a letter would be required stating that the employees wanted to decertify from the Union and that it must be signed and dated and taken to the National Labor Relations Board. About the last week in August, there was another conversation at a time when Gordon was in the meat market department and Dancer walked up. Phillips was present at that time also. At this time, Dancer stated he wanted to get the petition filed by Friday and was having a hard time because his work schedule and that of other employees conflicted. Dancer asked Gordon how he would be able to contact each of the employees. Gordon then pointed out that Dancer would have to see certain people on Friday and others at night according to the schedule. Gordon pointed to three names that were on the schedule and told Dancer that he did not need to see these employees because they had been terminated. Dancer again asked him for the address to the National Labor Relations Board and Gordon gave it to him. On Friday, Dancer told Gordon he had the petition and again asked for the address of the National Labor Relations Board. Gordon gave him the address again. Dancer did not ask for any special consideration for filing the decertification petition or that he be given any additional hours for filing the decertification petition. Gordon maintained that Dancer initiated the decertification petition issue and that he (Gordon) at no time asked or ordered Dancer to circulate the petition or to file it with the National Labor Relations Board. As noted above, Phillips did not testify.

a. Analysis

I credit the testimony of Dancer. I found him to be a credible witness who testified with detailed and specific recollection of the facts involved in a fortwith manner. His

testimony is unrebutted with respect to his conversations with Phillips who did not appear and testify at the hearing. Moreover, much of his testimony was not specifically rebutted by Gordon who testified concerning these events. However, to the extent to which there is a conflict between Gordon's testimony and that of Dancer, I credit Dancer. I, accordingly, find that by reason of the initial conversation on July 20, between Dancer and Phillips wherein Phillips asked Dancer if he would work without the Union and that he might be able to give Dancer more hours, Respondent Sewell-Allen, Inc. No. 2, violated Section 8(a)(1) of the Act by soliciting Dancer to withdraw from the Union and by promising increased working hours if he did so. I find by Gordon's solicitation of Dancer to circulate the decertification petition said Respondent also violated Section 8(a)(1) of the Act. *Robert E. Anderson and Richard E. Anderson, co-partners d/b/a Anderson's Cabinets*, 241 NLRB 513, 518 (1979), enfd. 611 F.2d 1725 (8th Cir. 1979). I find that Respondent violated Section 8(a)(1) of the Act in each of the instances set out above wherein either Phillips or Gordon solicited the circulation and filing of the decertification petition by Dancer. I further find that by the promise of benefits of more hours to Dancer for filing the petition, Respondent also violated Section 8(a)(1) of the Act.

12. The Discharge of Part-Time Employees Bill Gross, Theresa Heist, and Becky Hordyk and the Demotion of Johnny Worrell

Worrell's testimony concerning the circumstances of his demotion from head meat cutter to journeymen meat cutter was set out previously in this decision. Heist testified that she was initially employed at Big Star No. 103 and had commenced working in that store in 1978 prior to its take over by Sewell-Allen. She was employed as a part-time meat wrapper and was also used for relief work as a meat wrapper. She had obtained her job at Store 103 through the Union. Several weeks prior to her layoff in August 1982, she was told by other meat department

employees that the store would lay her off soon. She contacted Store Manager Gordon in the front the the store the next day and told him that she had heard that she was to be laid off. Gordon told her that this was a mistake on Clifford Phillips' part, who had told the other employees of this, and as long as he (Gordon) were there, she would have a job. Gordon went on to tell her that she was a very good wrapper and was dependable because she had been substituting for two other wrappers who were ill. She told Gordon during this conversation that she had always worked through the Union because they knew her reputation as a meat wrapper and that she was dependable. Gordon stated she would have a job there as long as he had one and she was not going to be laid off. On the day of her layoff she was called by Gordon into the meat department office and he told her he was sorry but he was going to have to let her go. She did not question him at this time. She telephoned Clifford Phillips that evening as Gordon was not at the store. She told Phillips that she thought they were wrong to lay her off and Phillips told her that it was out of his hands and to get in touch with the Union. During 1982, shw was scheduled to work 1 day a week on Tuesdays but frequently worked more than one day a week as a relief employee.

Mary Armour, the mother of Becky Hordyk, Mary Fortner, the sister of Theresa Heist, and Worrell all testified that approximately the last week of July, they were called to a meeting with Clifford Phillips who informed them that Hordyk and Heist would be laid off and that the present week would be their last. On inquiry by Armour as to why they were informed of this, Phillips informed them that he wanted them to know what was going on in the market. Armour testified further that 2 days following the conversation with Phillips she was approached by Gordon who informed her that Becky Hordyk, her daughter, would not be laid off.

Mary Fortner, the sister of Theresa Heist, who had been employed as a meat wrapper at Big Star No. 103 until she was laid off on January 8, 1983, also testified that she attended a meeting held by Clifford Phillips in July 1982. Worrell and Armour were present at which time Phillips told the employees that he was going to lay her sister Theresa Heist and Becky Hordyk off, and that this would be their last week. Fortner testified that her sister Theresa Heist was laid off approximately a month after the conversation with Phillips concerning the layoff of Heist.

As set out previously in this decision, Dancer had been informed by Gordon on August 26, in connection with his circulation of the decertification petition, in response to Dancer's reservations concerning whether the employees would sign the petition that it would be even now as Gross, Hordyk, and Heist were "no longer with us." Heist, Hordyk, and Gross were terminated sometime during the week of August 21, 1983. Additionally, on August 25, Clifford Phillips was demoted from meat supervisor to head meat cutter and Worrell was informed by Gordon that Phillips was being demoted from meat supervisor to head meat cutter and that Worrell himself was being demoted to a journeyman position with a consequent loss in salary.

Sewell and Allen testified tht the decision to discharge meat wrappers Heist and Hordyk was consistent with a decision to eliminate part-time employees in the meat department. Sewell and Allen contended that when they originally took over the store a year prior thereto, the store had been profitable and they had wanted to allow a sufficient amount of time to observe the operation of the store and make as few changes as possible until they were certain those changes would be beneficial to the store's operations. They testified that the decision to eliminate part-time employees was actually made in mid-July after the performance of the store for the prior year thereto had been discussed among themselves and Store Manager Gordon. Gordon testified only that prior to the termination of Heist, he had a conversation with her concerning her possi-

ble layoff or termination which occurred possibly 2 or 3 weeks prior to her termination as she had heard that she was going to be laid off and was upset, and that he told her that there were no definite plans for a layoff and if she were to be laid off he would tell her about it. He recalled nothing else of that conversation. He contended that he had not assured her that she would never be laid off.

With respect to the termination of Bill Gross, a part-time meat cutter, who was otherwise employed as a fireman, Sewell and Allen testified that the termination of Gross resulted from a complaint by the Union that the Respondent was not complying with the terms of the labor agreement which contained a requirement that a meat cutter be on duty at all times including the evening hours when the market was open for business. The complaint had been received by a letter of the Union dated July 27, 1982. Sewell and Allen testified that the decision was then made to give Dancer the extra hours worked by Gross and put him on the night shift in order to comply with the Union's request as Gross was unable to work night hours because he held a full time position as a fireman. Sewell and Allen acknowledged that they had not discussed the possibility of a schedule change with Gross nor was there any evidence that anyone else had discussed it with him. Sewell and Allen also contended that Phillips had been made a head meat cutter and Worrell demoted to a journeyman position in response to a grievance filed by the Union (G.C. Exh. 9) dated July 12, 1982, which grievance contended that Phillips as a supervisor was performing journeymen duties in violation of the labor agreement, and that there had been a duplication of titles which had existed prior to their taking over the store with Phillips as a supervisor and Worrell as a head meat cutter.

a. Analysis

I credit the testimony of employees Worrell, Dancer, Heist, Fortner, and Armour as set out above. I find that

General Counsel has made a prima facie case of violations of Section 8(a)(1) and (3) of the Act by Respondent's discharge of the three part-time employees Hordyk, Heist, and Gross, and by the demotion of employee Worrell from head meat cutter to journeyman meat cutter. The animus of said Respondent toward the Union has clearly been demonstrated in this case, as has the Respondents' sponsorship of the decertification petition and its attempts to solicit employees to withdraw from the Union which were accompanied by numerous violations of Section 8(a)(1) of the Act. I find these circumstances are sufficient to support an inference that the actual motivation for Respondents' actions in terminating these three part-time employees and demoting Worrell were to support its sponsorship of the decertification petition in order to rid itself of the Union. As the General Counsel points out in its brief, only 7 persons of a 17-man unit in the store that included the part-time employees signed the decertification petition. One of the individuals who signed the petition was Clifford Phillips who was a supervisor prior to his demotion on August 27, the day he signed the petition. Additionally, Gordon's statement to Dancer that things are even now when he informed him that he had terminated the three part-time employees on that week resulted in the reduction of three unit employees. The inclusion of Phillips in the unit made him eligible to sign the petition in favor of decertification of the Union. In the absence of Phillips' signature only 6 out of 13 employees would have signed the petition even after the termination of the three part-time employees. Moreover, Worrell's demotion on the same date was consistent with Respondent's attempt to make Phillips eligible to sign the decertification petition to bolster support for the descertification petition. I have reviewed the testimony of Sewell and Allen and of Gordon regarding the reasons assigned by them for the termination of the part-time employees and for the demotion of Worrell and Phillips, and I find that these reasons were not the true reasons, but rather were pretextual. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). However, assuming arguendo, that

Respondent was motivated in part by economic considerations, in discharging the three part-time employees and in demoting Worrell, I find that Respondent has not demonstrated that the discharges of the three part-time employees, Heist, Hordyk, and Gross, and the demotion of Worrell would have occurred in the absence of Respondent's unlawful reasons for doing so. I thus find that the General Counsel has made a prima facie case that Respondent has violated Section 8(a)(3)and (1) of the Act in terminating Theresa Heist, Becky Hordyk, and William Gross, and in demoting Johnny Worrell and that Respondent has failed to rebut the prima facie case. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981); *NLRB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983).

13. The Discharge of James Kimbrough

Kimbrough was initially hired by Sewell-Allen Big Star, Inc. No. 2, d/b/a Big Star No. 103 in January 1982. Kimbrough was a member of the Union and, was as the evidence set out above indicates, the most outspoken member of the Union among the employees in the meat department in Store 103 in favor of remaining in the Union and who opposed the unlawful efforts of Sewell and Allen in sponsoring the decertification campaign among its employees. This opposition by Kimbrough was met by a threat by Sewell in August wherein after Kimbrough responded he would stay in the union, Sewell told Kimbrough that this decision by Kimbrough meant whether Kimbrough would have a job or not and that Kimbrough had better think about his wife and children. I have credited the testimony that this threat did in fact occur as set out previously herein in this decision. Moreover, Kimbrough also testified that he was present at a meeting of the employees of Sewell Allen Big Star Nos. 103, 189, and Sewell's Big Star No. 187, held in November 1982 at which time it was announced by Sewell and Allen that they no longer recognized the Union as the collective bargaining

representative of the employees of the stores. At that meeting, Kimbrough walked out of the meeting with other employees and went to Respondent's parking lot and passed out literature soliciting membership in the union, while Sewell, Allen, and Gordon came out of the store and watched Kimbrough passing out the literature for approximately a half hour until he left the premises. On January 8, 1983, Kimbrough was summoned to the office of Gordon at which time Gordon informed him that there was too much help in the meat market and that he would be laid off. This was 9 days prior to the scheduled commencement of the hearing in this case. Subsequently, Kimbrough was recalled from January 22 to February 12, 1983, as a substitute for an employee who was hospitalized and was informed at this time that his recall was only temporary in order to fill in for the hospitalized employee.

Sewell and Allen, testified that the meat department in Store 103 was overstaffed and they were aware of this in late October or November at which time Store Manager Gordon informed them that there were too many man hours worked in the meat market. Gordon corroborated this but did not specifically testify regarding the decision to terminate Kimbrough. Sewell and Allen contended that the amount of work to be performed by meat cutters had declined as a result of a switch from using hanging beef which required substantial cutting and additional work to boxed beef which had already been cut up into smaller portions and from a change from whole chickens which needed to be cut to pre-packaged chickens both of which changes required less work on the part of the meat cutters and that the figures for dollars per man-hour worked in the meat department showed that the meat department in Store 103 was performing at a figure below that of $140 per man-hour which Respondent contended was the proper standard to be applied. Sewell and Allen testified that at the time the decision was made to terminate Kimbrough, no action was taken as a meat wrapper was ill during most of November and December, and meat cutter Worrell was absent for jury

duty during a 2-week period in December and that Respondent also did not wish to make a change during the Christmas season.

I find that the General Counsel has made a prima facie case of a violation of Section 8(a)(1)(3) of the Act by reason of Respondent's discharge of Kimbrough, Respondent's animus toward the Union and toward Kimbrough as a supporter of the Union and an outspoken opponent of Respondent's unlawful campaign to decertify the Union has been demonstrated. Additionally, the timing of the discharge, of the most outspoken proponent of the Union among its employees only 9 days prior to the commencement of the hearing in this case, would not be lost on its other employees who were scheduled to testify in this case. I do not credit the testimony of Sewell and Allen concerning their purported reasons for the discharge of Kimbrough. I find that the reasons set forth by them (the change to boxed beef and pre-package chickens and the alleged unsatisfactory dollars to man hour ratio in the meat deparatment) were not the real reasons for the termination of Kimbrough. I find that said reasons were pretextual. *Limestone Apparel Corp.*, supra. Assuming arguendo that Respondent was motivated in part by economic considerations in discharging Kimbrough, I find that Respondent has failed to rebut the prima facie case of the General Counsel and has failed to demonstrate that Kimbrough would have been terminated in the absence of the unlawful reasons as found herein. *Wright Line*, supra; *NLRB v. Transportation Management, Corp.*, supra. I, accordingly, find that Respondent Sewell-Allen, Inc., No. 2 violated Section 8(a)(1) and (3) of the Act by its discharge of employee Kimbrough.

14. The Alleged Violations of Section 8(a)(5) and (1) of the Act by Reason of the Course of Conduct Engaged in by Sewell-Allen Big Star, Inc., and Sewell Allen Big Star No. 2 and by Sewell's Big Star, Inc.

With respect to Sewell's Big Star, Inc., there has been no evidence presented by the General Counsel of any independent violations of the Act apart from withdrawal recognition from the Union in November 1982, and actions undertaken thereafter. However, with respect to Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star No. 2, Inc., I find that for all purposes herein, the two corporations were operated as a single employer as demonstrated by a common approach by its two owners, Sewell and Allen, with respect to labor relations and the handling thereof and specifically with respect to the instances cited herein previously in this decision regarding the findings of various violations of the Act and coordinated approach to their solicitation of their employees' withdrawal from the Union. It is apparent from a review of the testimony in this case that Sewell and Allen because of their dislike of Sheppard, the president of Local 1529, determined that they would not deal with him and initiated a pervasive campaign to rid themselves of him and the Union which he represented which included the gamut of unfair labor practices as found herein.[5] These Respondents threatened their

---

[5] *A note concerning credibility determinations with respect to Lex Sewell and Dan Allen in this proceeding:* As will be noted herein, I have discredited the testimony of Sewell and Dan Allen on a number of occasions in this proceeding wherein their versions of the incidents in question conflicted with those of the individual employees who testified. I found the testimony of the employees to be candid and believable although I recognize there were variances in their testimony. However, there was a common thread throughout their testimony, that Sewell and Dan Allen initiated the meetings between themselves and the employees, which meetings were ostensibly held to discuss problems with the merger. Much of the testimony of the employees in this regard is not disputed by Sewell and Dan Allen (i.e., that the meetings took place, were on at least some occasions initiated by Sewell and Allen who discussed their dislike of Sheppard, their previous difficulty in dealing with the Unioin, the possibility of a strike, the employees withdrawal from the Union, and wages and benefits in the event of their withdrawal from the Union). These meetings were utilized by Sewell and Allen to interrogate their employees concerning their support for the Union, to advise the employees of their dislikes of Local 1529's President Leon Shep-

employees with strikes, discharge, and store closure. Respondents followed through on certain of these threats by the discharge of four employees, and the demotion of one employee as well as by their withdrawal of recognition from the Union and refusal to bargain and the institution of unilateral changes in the terms and conditions of employment of their employees without notice to or bargaining with the Union. I find that this pervasive campaign initiated by Respondent and followed over a course of several months up to the time of the hearing in this case with respect to the discharge of Kimbrough constitutes a separate and continuing violation of Section 8(a)(5) and (1) of the Act as this attempt to undermine the Union was wholly inconsistent with Respondent's obligation to bargain in good faith with the Union and that Respondents Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star, Inc. No. 2 thereby also violated Section 8(a)(5) and (1) of the Act. *Taurus Waste Disposal, Inc.*, 263 NLRB 309 (1982).

F. Independent Allegations of Violations by Bakers Bros., Inc., d/b/a Bakers Big Star Stores Nos. 31, 61, 64, and 81.

Footnote 5 continued.

pard, referring to him in derrogatory terms and advising of their perceived inability and/or unwillingness to accept or deal with Local 1529 as the collective bargaining representative of their employees. These meetings were characterized by the carrot and stick approach with Dan Allen, principally holding the carrott in terms of improved pension and other benefits and competitive wages if the employees would abandon the Union and Sewell principally holding the stick in terms of his perceived inability and unwillingness to deal with Sheppard and the issuance of threats of strikes and discharge and store closure if he were required to bargain with Local 1529. While Dan Allen had a ready answer to questions propounded to him on the stand in his testimony, and Sewell's manner at the hearing was mild, I cannot credit their version of these meetings to the effect that they were merely informing the employees of perceived problems as a result of the merger and responding only to questions initiated by employees. Rather, I find that the evidence overwhelmingly shows that Sewell and Dan Allen engaged in a protracted effort to rid thermselves of Local 1529 as the collective bargaining representative of their employees.

the complaint, as amended, alleges that Respondent Bakers Bros., Inc., committed various violations of Section 8(a)(1) and (5) by engaging in interrogation of its employees, the issuance of threats, promise of benefits, and the solicitation of its employes to abandon its support of the Union and by sponsoring the circulation of two decertification petitions to decertify Local 1529 as the collective bargaining representative of its employees.

1. The Supervisory Status of Employees Mike Hamm, Todd McClellan, Mark McCellan, and John Westmoreland

The General Counsel contends that Respondent Bakers committed violations of Section 8(a)(1) during the course of its campaign to decertify the Union through the circulation of two decertification petitions during the summer and fall of 1982 and by engaging in acts of interrogation, threats, promises of benefits, solicitations to abandon support for the Union, and to decertify Local 1529 engaged in by bargaining unit member employees Mike Hamm, Todd McClellan, Mark McClellan, and John Westmoreland, whom the General Counsel contends were supervisors under the Act. Respondent contends that these individuals were not supervisors and that it is not responsible for their activities in this regard.

a. The supervisory status of Mike Hamm.

Mike Hamm was designated as the meat market manager/head meat cutter at Bakers Store No. 61. Mary Monasco, a meat wrapper at Bakers No. 61, testified concerning the duties of Hamm as follows: Hamm is the market manager at Big Star No. 61. She went to the old Bakers Big Star store down the street in July 1982 and applied to Hamm for employment. Hamm had hired another meat wrapper and told her to check back when the new store (the current store No. 61) was opened. She did so, and Hamm took her name and address and called her on the

Saturday of the grand opening whereupon she commenced working at Big Star No. 61 in July 1982. Hamm writes out the employees' work schedules, Her hours vary from week to week. She has only taken one day off since she has been employed as a result of a death in the family. She spoke to Hamm concerning this day off, and he allowed her to take the time off. She has asked Hamm for instructions with respect to wrapping meat. He instructs her on how to work smoked meats and change prices.

Vickie Mason, who had been employed at Big Star No. 61 in 1982 as a meat wrapper, testified as follows: The market manager at Bakers Big Star No. 61 is Mike Hamm. Hamm disciplined her when she was 3 hours late for work. On that occasion he told her not to come in the rest of the day, and that if she did not come in on time the next day, she should not come in. Hamm does the hiring at Bakers Big Star No. 61, and she is aware of this because he hired a friend of hers, Patricia Doty, whom she had recommended. This took place after an interview at which only Hamm and Doty were present. On cross-examination, she testified that when she referred Patricia Doty to Hamm, Hamm told her he was going to need some help, and he was going to call Al Baker and talk to him about hiring someone.

Richard Floyd, who had been employed by Bakers Big Star No. 61 in the meat department as a meat cutter for approximately 6 months from June until December 1982 when he was transferred to Big Star No. 64, testified as follows: Hamm instructed him on what meat to cut and would leave a list of items for him to do such as to make ground beef, fill the meat counter, work smoked meats, and the like. Hamm made out the employees' work schedules, and if Floyd needed a day off, he asked Hamm, and Hamm would change it. On occasion, Hamm asked Floyd to work overtime.

Roy Needham, who is employed at Bakers Big Star No. 61 as a journeyman meat cutter and who had been at

that store since it opened, testified as follows: Needham has requested time off from Hamm, who has told him that he would let him know. On occasions when business has been slow, Needham has asked Hamm to take a personal holiday, and Hamm has allowed him to do so. Hamm prepares the work schedules at the store. Needham worked overtime when the store initially opened. On those occasions when he worked overtime, Hamm asked if he would mind staying an hour or two more, and he agreed to do so. Sometimes there would be very little notice prior to this. Hamm spends approximately 25 percent of his time cutting meat. Hamm usually inspects Needham's work, and directs him to change it, if it is not according to the way he wants it. Hamm orders the meat and poultry.

Al Baker testified as follows concerning the supervisory status of Hamm: Patricia Doty was employed at Big Star No. 61 just prior to that store's move to its new location a few blocks south. The decision to employ her was made jointly by Al Baker and his son Mike Baker. Hamm, the head meat cutter in Store No. 61, informed them that Patricia Doty was a friend of meat wrapper Vickie Mason who had recommended Patricia Doty was a friend of meat wrapper Vickie Mason who had recommended Patricia Doty to them for employment. Hamm suggested that as they were getting ready to go into a larger store and were going to need more wrapping help, they should be training the new meat wrapper (Patricia Doty) in the few weeks that they would have prior to going into the store. Mary Jane Monasco was employed during the grand opening of the new larger store which came about as a result of a large overflow of work that could not be handled by the existing crew during the opening as every employee was working all the overtime they were able to and they were still unable to keep up with the work. Hamm had her application on hand as he had checked with them prior to this before he had talked to Mike Baker about her. Al Baker authorized the hiring and told him to hire her as soon as he could get her as it was his understanding that she was an experienced

meat wrapper and would be able to start right away. Al Baker did not review her application prior to her hire.

Mike Baker, a vice president of Bakers Bros., Inc., and the son of Al Baker, testified concerning the duties of Hamm as follows: Hamm is employed at Big Star No. 61 as a head meat cutter and has been so employed for 3 years. The head meat cutter's duties at Big Star No. 61 do not differ from those at Big Star Nos. 31, 64, or 81. In 1982, the high level of employment at Big Star No. 61 in the meat market was 11 employees and the low level was 4 employees. The highest number of employees was reached in July 1982 and the low was reached in June 1982. As a head meat cutter, Hamm ordered fresh meat, cut meat, trayed meat, wrapped meat, directed the work of other employees in the market, and had the same duties as Todd McClellan. Hamm was hourly paid throughout 1982 and was covered under the collective bargaining agreement for the Meat Cutters (Local 452) Health and Welfare Trust Fund throughout 1982, and the pension fund from June through August 1982. Hamm did not have the authority to hire or fire individuals as head meat cutter at Big Star No. 61 nor to grant wage increases or discipline employees during 1982 as only Mike and Al Baker had that authority. The circumstances under which Mary Jane Monasco was employed at Big Star No. 61 were that Bakers had moved Big Star No. 61 to a new location a few blocks south of its previous location into a larger store, and they were involved in a grand opening sale and business had quadrupled and employees were working 40 to 50 hours a week overtime and Hamm asked Mike Baker to give him additional help from other stores because people were worn out after 2 weeks of such long hours. Hamm told Mike Baker he knew of an experienced wrapper who had an application in at the courtesy booth. Mike Baker told him that since it was an emergency situation, to call her and get her in to work as soon as he could and hire her on that basis. The circumstances under which Patricia Doty was hired in June 1982 were that she was recommended to Al and Mike

Baker by Vickie Mason who was a meat wrapper at Big Star No. 61. she had been recomended to Mike Hamm, and he asked Mike Baker if he could call an additional wrapper to be trained for the grand opening, and Mike Baker directed him to do so. Mike Baker made the decision to try and train an additional wrapper in June to prepare for the grand opening and, after the grand opening determined that this was not enough, and Al and Mike Baker determined that it would be necessary to hire additional help because of the large amount of overtime hours that were being incurred by present employees. This is when the decision was made to hire Monasco. Mike and Al Baker together made the decision to hire Doty and were also together the day the decision was made to hire Monasco. Mike Baker was responsible for deciding when overtime would be worked at Big Star no. 61, and he authorized Hamm to ask employees in the market to stay later each day until work was performed because of the great deal of business during the grand opening. The level of overtime has since ceased. Mike Baker made the decision as to when overtime would stop. Hamm has never had the authority to determine when overtime would be worked until he (Mike Baker) gives him that authority by directing him to schedule a person for more hours in a particular week if someone is sick or the like. The authorization is just for a particular day. Mike Baker visits the stores daily. Hamm has no authority to issue reprimands of any nature to employees.

I credit the testimony of employees Mary Jane Monasco, Vickie Mason, Richard Floyd, and Roy Needham, concerning the authority exercised by Hamm. On cross-examination, Mike Baker acknowledged that although he appears at the store on a daily basis, he is only there for a brief period of time. For the remainder of that time, Hamm is in charge of the meat department. As such, he has instructed the employees, corrected the employees' work, approved days off, assigned overtime, made out work schedules, and has ordered meat products. According

to the testimony of Needham, Hamm only spent approximately 25 percent of his time actually cutting meat. I find that Hamm is a supervisor although he unquestionably performs meat cutting duties. *Liberty Markets, Inc.*, supra; *Big John Super Stores, Inc.*, 232 NLRB 134, 135 (1977). Moreover, the specific testimony of the employees that Hamm interviewed and made effective recommendations to Mike and Al Baker with respect to the hiring of both Monasco and Doty as meat wrappers at Store 61 was uncontroverted. *Gerbes Supermarkets, Inc.*, 176 NLRB 11, 15-16 (1969). I have considered the testimony of Mike Baker that Hamm did not have the autherity to hire, fire, reprimand employees, or to schedule overtime without his consent. However, the facts as developed through the unrebutted testimony of the employees demonstrate that he has actually exercised the authority to hire, or at least effectively recommend the hire of new employees, schedule overtime, reprimand employees and granted time off to employees as well as instructed them in their work. Accordingly, I find that Hamm was, at all times relevant herein, a supervisor within the meaning of Section 2(11) of the Act.

b. The supervisory status of Todd McClellan

William Mayfield, an apprentice meat cutter employed by Bakers at Store No. 61, at the time of the hearing but who had previously worked at Big Star No. 81 testified as follows: Todd McClellan was the meat market manager for Store No. 81 for the 3 to 4 months preceding August 1982 when Johnny Westmoreland became the store manager for Store 81. During this period Todd McClellan ordered beef, pork, chickens, and smoked meats. He instructed Mayfield how to cut the meat on order and also for special orders for customers. If Mayfield needed a day off, he asked Todd McClellan. In late June or early July, he asked Todd McClellan to change his day off for the week of August 27 as he was getting married. Todd McClellan told him there would be no problem and they would work it out. At the end of the week, Todd McClellan totaled the hours of the employees' time cards on

of the employees' time cards on Saturdays.

Randy Inman, a meat cutter who at the time of the hearing had been employed at Bakers Bros. Inc., Big Star No. 64 for approximately 2½ months prior thereto but prior to that had been employed at Big Star No. 81 for approximately a year and who had been with Bakers for 13 years, testified as follows: At the time he left Big Star No. 81 about 2½ months prior to the date of the hearing, the meat market manager was Johnny Westmoreland. Prior to that in the summer of 1982, Todd McClellan had been the meat market manager from approximately the end of March 1982 until August 1982. As meat market manager, Todd McClellan corrected Inman's work. Inman, who was a second man, also corrected other employees' work that he say an employee make. When Todd McClellan was the meat market manager, if overtime was required, he would ask the employees to work overtime and would approve the overtime. In 1982, Inman took a vacation and asked Todd McClellan to approve it.

Mike Baker testified as follows: Head meat cutters were responsible for directing journeymen meat cutters and assigning tasks to other employees. Todd McClellan is the brother of Mark McClellan who is the brother-in-law of Michael Baker and the son-in-law of Alvin Baker. In the spring of 1982, Todd McClellan was a journeyman meat cutter at Bakers Big Star No. 31. In June 1982, Todd McClellan moved to Big Star No. 81 and became the head meat cutter. There were three people in the market. Tonya McClellan, who was Todd and Mark McClellan's sister, was a part-time wrapper for several months during the spring of 1982. Baker testified that Todd McClellan was employed at Bakers Big Star No. 31 from January to June 1982 as a journeyman meat cutter and ordered and cut meat as necessary, received deliveries and waited on customers as necessary and otherwise performed the functions of a journeymen meat cutter. He also trained his sister to wrap meat on a part-time basis for several months during early

1982. At Big Star No. 31, Todd McClellan did not have the authority to hire or fire anyone, to grant wage increases, or to discipline employees. Todd McClellan was a unit included employee and payments were made on his behalf to the Union's Pension Fund. Todd McClellan was also covered by the Union's health and welfare plan throughout 1982. Mike Baker made the decision to move Todd McClellan to Big Star No. 81 where he assumed the position of head meat cutter. Including Todd McClellan, there were four employees at Big Star No. 81. Todd McClellan remained as the head meat cutter at Big Star No. 81 until Mike Baker transferred him to Big Star No. 61 on August 15, where he bacame a journeymen meat cutter. As a head meat cutter at Big Star No. 81, Todd McClellan's duties were to lead, direct, order, cut meat, receive deliveries, wait on the counter, and perform the same duties he had as a journeyman meat cutter. Ninety-eight percent of his time was involved in cutting meat, traying meat, and performing other journeymen related meat cutting duties, including waiting on customers, pulling meat out of the counter and putting meat in the counter. Todd McClellan did not have the authority to hire, fire, grant wage increases, discipline employees, or assign overtime work to be performed in the meat department at Big Star No. 81 as only Mike Baker or Al Baker had that authority. Todd McClellan punched a time clock at Big Star No. 81, 61, and 31. Approximately one day a week, Todd McClelllan was the only employee in the meat market. In McClellan's absence from the market, Randy Inman served as head meat cutter at which time he would turn in orders and direct the work of other employees. Todd McClellan did not have the authority to issue any written or oral reprimands and has never had such authority as a journeymen meat cutter.

NO. 91-1263

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX
VOLUME II

Decision of the Administrative Law Judge dated May 4, 1984

David P. Jaqua
Kullman, Inman, Bee, Downing & Banta
5100 Poplar, Suite 1410
Memphis, TN 38137
Telephone: (901) 763-1771
Counsel of Record
for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

I find that Todd McClellan was given and exercised the indicia of supervisory authority, and was a supervisor within the meaning of Section 2(11) of the Act during the period when he served as head meat cutter at Store No. 81. In making this determination, I have considered the fact that McClellan was the highest ranking employee on the job in the meat department except for those limited occasions each day when Mike Baker was present and visited the store. Todd McClellan exercised supervisory authority by the granting of time off and the assignment of overtime in his position as well as correction of employee mistakes and direction of work. Thus, Todd McClellan exercised the authority to permit employees time off, to leave work early, to schedule and assign overtime, and in his absence the employees in the meat department would have operated essentially without any direct supervision. See *Gerbes Supermarket, Inc.*, supra; *Big John Super Stores, Inc.*, supra. Moreover, I find that as a result of the relationship of Todd McClellan as the brother of the son-in-law of Al Baker, his interests were much more closely identified with management than with the other employees, and as will be hereinafter discussed, he exercised this unique position on behalf of management in the circulation of the decertification petitions, which petition was subsequently endorsed by Al Baker. See *Indian Head Lubricants, Inc.*, 261 NLRB 12, 18 (1982).

c. The supervisory status of Mark McClellan

Mark McClellan is the son-in-law of Al Baker, and served as the meat market manager at Store No. 31 in the summer of 1982. There was no direct evidence presented by the General Counsel concerning the supervisory status of Mark McClellan except their contention that he held the same position as meat market manager and had the apparent authority of a meat market manager, and should, accordingly, be found to be a supervisor under the Act. I find, however, that the absence of direct evidence of supervisory status is insufficient to support a finding that he was a

supervisor within the Act. However, Mark McClellan is the son-in-law of Al Baker, and this relationship cannot be ignored in assessing his apparent authority, placement, and position as meat market manager. Moreover, his utilization of that apparent authority on behalf of management in the circulation of the decertification petitions which petitions were endorsed by Al Baker demonstrated his close identification with management. Under these circumstances, I find that he possessed the apparent indicia of supervisory authority, was closely identified with management, and acted on behalf of management. *Indian Head Lubricants, Inc.*, supra.

d. The supervisory status of John Westmoreland

John Westmoreland served as a roving head meat cutter from November 1981 until July 1982 at which time he was assigned to Store No. 61 and once again became a journeyman meat cutter but continued to be paid as a head meat cutter until he was transferred to Store No. 81 in mid-August as a head meat cutter. As a roving meat cutter, Westmoreland was paid at the rate of a head meat cutter, was provided an automobile, went from store to store to demonstrate the cutting of 3-piece boneless chucks and other labor saving devices, and the teaching of improved sanitation methods to persuade head meat cutters that those particular stores should institute these ideas and programs. Both Mike Baker and Al Baker testified that Westmoreland did not have the authority to hire, fire, discipline, or schedule employees.

Apprentice meat cutter Mayfield testified that from August 1982 until the time he left Store No. 81 approximately 3 to 4 months prior to the hearing in January 1983, Westmoreland ordered beef, pork, and chickens, and gave Mayfield a price list and told him what the prices were and to change the prices for upcoming ads. If there were any need for discipline, the meat market manager would talk to

the employee and would then call Baker. When Westmoreland was initially put in charge of the meat market, he talked to Mayfield and told him he was in charge of the market and told him how he wanted things done, and if the employees did not do as he wanted them, he would find a way to have them removed or see that they would be transferred to another store.

Robert Travis, a journeyman meat cutter, who at the time of the hearing was employed at Bakers Big Star No. 61 but had previously been employed at Bakers Big Star No. 64 after having been initially transferred from Bakers Big Star No. 61 to No. 64 in January 1982, testified as follows: While he was at Bakers Big Star No. 61 in early January 1982, John Westmoreland's title was that of supervisor as he was told this by Mike Hamm who told him that Westmoreland would be his new supervisor. At that time, Hamm's position was that of market manager. Shortly after this conversation, Travis had a conversation with Westmoreland wherein he asked Westmoreland if he could get transferred back to Store No. 64. Westmoreland replied he probably could but it would be after the first of the year. While Westmoreland was meat supervisor, he had the authority to discipline employees and write up employees. Westmoreland came into Store No. 64 when Travis was transferred there, had a notebook and stated he would be back at 10 a.m., and if he found a brown piece of meat in the counter, he would write the employees up. On cross-examination, Travis testified he talked to Westmoreland about his transfer from Store No. 61 to No. 64 before Christmas and was transferred to Store No. 64 after the first of the year.

I credit the testimony of Travis and Mayfield as set out above. I find that on the basis of their unrebutted specific testimony concerning the exercise of supervisory authority by Westmoreland as meat market manager of Store No. 61 and as a roving meat cutter, that Westmoreland was a supervisor within the meaning of Sec-

tion 2(11) of the Act. *Liberty Markets, Inc.*, supra; *Big John Super Stores, Inc.*, supra.

2. The Interrogation of Mayfield by Todd McClellan

Mayfield testified that in June 1982, he was asked by Todd McClellan, the meat market manager at Store No. 81 if he was in the Union, and that at that time Todd McClellan complained to Mayfield concerning the Union as Union Representative Mancini had recently been in the market looking at the work schedules. As Todd McClellan did not testify at the hearing, the testimony of Mayfield in this instance is unrebutted. Accordingly, I find that Respondent Bakers Bros. Inc., violated Section 8(a(1) of the Act by Todd McClellan's interrogation of Mayfield concerning his union membership.

3. The Solicitation of Mayfield to Sign a Decertification Petition in Early to Mid-August 1982

Mayfield testified as follows: He was asked to sign a decertification petition during the grand opening of the store by Todd and Mark McClellan who brought the petition around and asked Mayfield to go in the back of the store and asked if he would sign the petition. They told Mayfield they were trying to get the Union decertified as it was better for the stores if they were nonunion, that the employees would make more money without the Union, and referred to a nonunion market which paid over union scale. Mayfield was also told that if the decertification petition were delayed, there could be a strike, and the Union would hire people to walk picket lines, throw things in the parking lot, and damage customers' cars, and that everyone would be hurt by a strike. The McClellans also told Mayfield they had enough signatures to decertify the Union, and they did not need his signature but he could sign the petition. He signed at the time because Mark and

Todd McClellan told him that the employees would have better wages, better benefits, that Baker was growing into a bigger corporation, and in the future it would be better for everyone without the Union. During the course of this conversation, Todd and Mark McClellan also stated that Al Baker was not going to sign a contract with the Union.

I credit the testimony of Mayfield, which testimony is unrebutted as neither Todd nor Mark McClellan were called to testify in this proceeding. Accordingly, I find that Respondent Bakers Bros. Inc., violated Section 8(a)(1) of the Act by the circulation of the decertification petition and by the solicitation of employee Mayfield to sign the petition. I, additionally, find that said Respondent violated Section 8(a)(1) of the Act by the promise to Mayfield that wages and benefits would be better without the Union. I find that the statements that there could be a strike with picket lines, misconduct, and that Al Baker would not sign another contract with the Union were also violations of Section 8(a)(1) of the Act as it demonstrated to the employees the futility of continued representation by the Union.

4. The Solicitation of Roy Needham to Sign the Decertification Petition

Needham testified that in either late July or August 1982, he was called into the office by meat market manager Hamm who asked him to sign a petition to decertify the Union. Todd and Mark McClellan were also in the office at this time. Hamm told him he did not have to do so but he would like for him to do so. Needham told Hamm he would like to think about it. During this meeting, Hamm also asked Needham if the Union were decertified, whether he would still work there. Needham replied he probably would until he could find something else. Todd McClellan asked Needham whether he would walk out if the Union picketed the store and told Needham that "if I (Needham) did, I might as well kiss it because I would lose my job." On

review of his affidavit, Needham recalled that Hamm also stated at that meeting that Al Baker did not like Leon Sheppard.

I credit the testimony of Needham which is unrebutted as Todd and Mark McClellan, and Hamm did not testify in this proceeding. Accordingly, I find that Bakers Bros. Inc., by the circulation of the decertification petition by Hamm in the presence of other supervisors, violated Section 8(a)(1) of the Act. I also find that said Respondent violated Section 8(a)(1) of the Act by reason of Todd McClellan's threat that Needham would lose his job if he joined a strike by the Union.

5. The Solicitation of Employees Monasco and Floyd for the First Decertification Petition

Monasco, a meat wrapper who has been employed by Bakers Big Star at Store No. 61 since approximately July 1982, testified that she was asked on two occasions to sign a petition to decertify Local 1529. The initial occasion occurred shortly after she went to work when Hamm spoke to her in August 1982 in the office of Store No. 61. Also present were Todd McClellan, Mark McClellan, and Westmoreland. Hamm called her into the office and explained that the contract with the Union would no longer be honored by Baker, that a new contract was coming up in October, and asked her to sign the petition which she did.

Richard Floyd, a meat cutter at Bakers Big Star No. 61 from June to December 1982, testified that approximately in August 1982, he was called into a meeting in the office at Bakers Big Star No. 61 by Meat Manager Hamm. Present in that meeting were Todd and Mark McClellan, Westmoreland, and Monasco. He testified that the two McClellans, Hamm, and Westmoreland asked him to sign a petition to decertify the Union and he did so. After signing the petition, he asked whether the employees would

lose any benefits if they withdrew from the Union and was told that they would not, and that the store could be run better without a union.

I credit the testimony of Monsaco and Floyd which is unrebutted as Hamm, Todd McClellan, Mark McClellan, and Westmoreland were not called to testify. Accordingly, I find that Respondent, by the circulation of the petition to decertify Local 1529 as the collective bargaining representative of its employees Monasco and Floyd in August 1982, violated Section 8(a)(1) of the Act. I further find that the remarks that were made to Floyd that the company could run better without the Union were violative of the Act as they constituted a promise of better conditions if the employees abandoned their support for the Union. I also find that the statement made to Monasco by Hamm that Baker would no longer honor the contract constituted a violation of Section 8(a)(1) of the Act as it demonstrated the futility of continued membership in and support of the Union.

6. The Solicitation of Mason

Mason testified that in August 1982, while she was working at Store No. 61, she and employee Patricia Doty were called into the office by Hamm. When they arrived, they found Todd and Mark McClellan, Hamm, Westmoreland, and another employee. Todd McClellan told them he was circulating a petition to give the employees the right to vote on whether to retain the Union, that there was a new president in the Union, Leon Sheppard, and that the contract (labor agreement) would not be signed because it was not the same local. He also stated there would be a lot of strain involved, and it there were a strike, it would cause the store to lose business and would cause a layoff of the employees. Mason inquired whether her position would be secure if this happened. Todd McClellan told her that the Bakers were some of the fairest people he had ever worked for and assured her that signing the petition

would in no way jeopardize her job. Mark McClellan stated that he had worked for the Bakers, they were very good people to work for, and that this was merely a petition to give the employees the right to vote on whether or not they wanted to vote the Union in or out. Either Mark or Todd McClellan told her that getting rid of the Union would not result in lower wages or benefits.

I credit the unrebutted testimony of Mason and find that Respondent Bakers violated Section 8(a)(1) of the Act by its solicitation of Mason and Doty to sign the decertification petition engaged in by Hamm, Todd and Mark McClellan, and also by Westmoreland as the solicitation and remarks by Todd and Mark McClellan were not disavowed by Westmoreland or Hamm. I also find that Todd McClellan's statement that a new contract would not be signed with the new local union was violative of Section 8(a)(1) of the Act as it demonstrated the futility of continued representation by the Union.

7. The Solicitation of Inman

Randy Inman testified that in approximately mid to late August 1982, while he was employed at Bakers Big Star No. 81, he was asked to sign a petition to decertify Local 1529 by Todd McClellan. He was cutting meat at the time and the two McClellans walked into the meat department and Todd McClellan asked if he would come to the back room to talk about something. Inman did so, and Todd McClellan then laid a piece of paper on the table and stated that he was circulating a petition against the Union, and he would like for Inman to look at it and read it. He told Inman he did not have to sign the petition. Inman did not sign the petition. At that time, Inman told Todd McClellan that he had been in the Union too long and could not afford to sign the petition. Todd McClellan then told Inman, "Randy, the Union is out, the Union is history." At that time, Mark McClellan told Inman that this time next year, Bakers Big Star would be a nonunion organization.

I credit the testimony of Inman which is unrebutted. I find that Respondent violated Section 8(a)(1) of the Act by the circulation of the decertification petition by Todd and Mark McClellan. I also find that the comments of Todd and Mark McClellan that the Union was out, and that Respondent would be a nonunion organization, demonstrated to Inman the futility of his continued support of the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

8. The Solicitation of Robert Travis

Travis testified that while he was employed at Bakers Big Star No. 64 in August 1982, he was asked by Todd and Mark McClellan to sign a petition to decertify Local 1529. Todd McClellan told Travis that he had a petition to decertify the Union, that they already had 52 percent of the employees' signatures and it made no difference if Travis signed or not. Travis signed the petition. At that time Todd McClellan told Travis that the Bakers would not negotiate with the new union, and that he (Todd McClellan) would not be surprised if the employees got a raise just to get rid of the Union. Todd also asked Travis to talk to two other employees concerning the decertification petition. Todd also made a statement that Leon Sheppard was out to get the Baker stores and that Baker did not want anything to do with Sheppard.

I credit the unrebutted testimony of Travis and find that Respondent violated Section 8(a)(1) of the Act by the solicitation of Travis to sign the petition by Todd and Mark McClellan. I further find that Todd McClellan's statement that Baker wanted nothing to do with Sheppard and would not negotiate with the Union was a threat of the futility of continued membership in and support of the Union, and was violative of Section 8(a)(1) of the Act. I further find that the statement by Todd McClellan that he would not be surprised if the employees got a raise just to get rid of the Union was an implied promise of a wage in-

crease if the employees chose to decertify the Union, and was violative of Section 8(a)(1) of the Act.

9. The Interrogation of Mayfield by Westmoreland

Mayfield testified that on August 5, 1982, Westmoreland talked to him near the meat department and asked whether he had been to the union meeting the night before. Mayfield replied that he had and wanted to hear the Union's side of the story, and told Westmoreland what had transpired at the meeting. Westmoreland told Mayfield that when the election came up pursuant to the decertification petition, that he (Mayfield) should think about how he was going to vote because if he voted to keep the union out, his job would be secure and he would not have to ever worry about anything. Westmoreland referred to Mayfield's upcoming wedding at the end of the month and told him that he (Mayfield) needed a job and that if he voted to keep the Union in, he would either lose his job or be cut from 40 hours to 20 to 25 hours per week, and that Mayfield had better think long and hard about how he was going to vote.

I credit the unrebutted testimony of Mayfield, and I find that by Westmoreland's interrogation of Mayfield as to whether he had attended the union meeting, that Respondent Bakers violated Section 8(a)(1) of the Act. I further find that by the issuance of the threat by Westmoreland to Mayfield that if Mayfield voted for the Union, he would either lose his job or have his working hours reduced, and by Westmoreland's statement that Mayfield's job would be secure and he would not have to worry about anything again which was a promise of security if Mayfield voted to decertify the Union, that said Respondent also violated Section 8(a)(1) of the Act.

10. The Interrogation of Mayfield by Al Baker

Mayfield testified that approximately 3 weeks after

the interrogation by Westmoreland, he was coming out of the cooler putting smoked meat out and Westmoreland was out front talking to Al and Mike Baker, and that Al Baker stopped him and asked him if the Union had been harassing him and he told Al Baker they had not. Al Baker then told him if he had any trouble with the Union or any problems to go tell Westmoreland and Westmoreland would take care of it. Mike Baker also asked him whether he had had any trouble with the Union. Al Baker testified that in the latter part of August 1982, while he and Mike Baker were in Store No. 81, he was informed by Westmoreland that a union man had interferred with Mayfield's work and they were probably discussing union matters. Al Baker then approached Mayfield and told him that he had been informed by Westmoreland that someone from the Union had interrupted his work, that Mayfield did not have to put up with that type of harassment, that if it occurred again, to let Westmoreland know or to call him (Al Baker), and that "we" would see that something is done about it. Baker acknowledged that Mayfield had not complained to him or anyone about being harassed by the Union, and that he (Al Baker) had initiated the conversation.

I credit the unrebutted testimony of Mayfield as set out above. I find that Respondent violated Section 8(a)(1) of the Act by the comments of Al Baker to Mayfield which constituted interrogation of Mayfield concerning his union activities and the solicitation of Mayfield to bypass his bargaining representative by bringing union contacts to the attention of management.

11. The Statements by Al Baker to Employees of Bakers Big Star No. 81 Concerning the Decertification Petition

Inman testified that in late August 1982, Al and Mike Baker came into the meat department, and Al Baker told the employees that he appreciated them standing up for the company and for signing the petition, and that he

felt as soon as he could get rid of all the interruptions, the company would operate a lot smoother. Also present during this conversation was Todd McClellan. On cross-examination, Inman recalled Baker stating that he had been informed by the NLRB that a petition had been filed for an election in their stores regarding union representation, and he understood that an overwhelming majority of the people in the meat department had signed it, that he appreciated those people who had stood up and signed the petition and he wanted employees to know that there would be an election and regardless of the outcome, they would not lose any benefits. Al Baker testified that he went to each of his three stores with his son Mike Baker and informed the employees that he had been notified by the NLRB that a petition for an election had been filed, and the employees would decide by secret ballot whether they wanted to continue union representation, but he understood that an overwhelming majority of the employees had signed the petition, and he appreciated the employees' confidence in him. He did not deny that he had made references to the interruptions with the company or that he had told the employees the company would operate a lot smoother without them. He acknowledged that he had been informed of the number of employees who had signed the petition by Todd McClellan. Baker also testified that he told the employees, regardless of the outcome of the election, there would be no loss in pay or benefits. His testimony was corroborated by Mike Baker.

I credit the unrebutted testimony of Inman. I find that under the circumstances, Al Baker's statement was an implied promise of improved working conditions as he was telling the employees that things would be better if they chose to decertify and get rid of the Union. This clearly referred to working conditions, and I find it was thereby violative of Section 8(a)(1) of the Act. *St. Francis Hospital*, 249 NLRB 180, 189-90 (1980).

12. The Solicitation of Monasco and Floyd to Sign a Second Decertification Petition

Floyd and Monasco testified that they were each approached in August 1982 by Todd McClellan while in the meat department at Big Star No. 61 and again asked to sign a second decertification petition which was then being circulated by Todd McClellan. At the time McClellan was no longer a market manager but was a journeyman meat cutter. Monasco refused to sign the petition stating that she had previously signed one and would not sign another.

I credit the unrebutted testimony of Monasco and Floyd and find that Respondent violated Section 8(a)(1) of the Act by its circulation of the second decertification petition by Todd McClellan. I recognize that at this point in time, Todd McClellan was no longer a market manager but was rather a journeyman meat cutter. However, it is clear that McClellan was serving as an agent of Respondent in the circulation of this petition and was reflecting company policy in this regard in light of the statements made by Al Baker as found herein and the prior attempts to decertify the Union by Todd McClellan. I find that Todd McClellan was placed in a unique position whereby he was least perceived to be speaking on behalf of Respondent in its attempts to decertify the Union. *Regal Shoe Shops, Nos. 2421 and 2340,* 249 NLRB 1210, 1214-5 (1980). This is so particularly with respect to Todd McClellan's relationship with Baker as a relative of the Bakers. *Indian Head Lubricants, Inc.,* supra.

13. Additional Comments and Analysis of the Section 8(a)(1) violations, the Circulation of the Decertification Petitions, and its Sponsorship by Bakers Bros., Inc.

I find that the solicitation of the employees to sign the decertification petitions and the various violations of Section 8(a)(1) of the Act by Hamm, Westmoreland, Todd and Mark McClellan were clearly sponsored and endorsed by Respondent Baker Bros., Inc. A review of these violations demonstrates that these individuals on behalf of

Respondent circulated the decertification petition, interrogated employees, promised them benefits if they abandoned the Union and signed the decertification petition, and threatened them with adverse consequences, including strikes, layoffs, and discharges, if they did not do so, and further threatened them with the futility of continuing to support the Union as Respondent would not sign a contract with the Union or deal with Sheppard. Al Baker endorsed these activities by his statement that he appreciated the signing of the decertification petition by the employees, and that he thought that things would run smoother if the interruptions (the Union) were out of the company made in the presence of Todd McClellan who had circulated the petition. Moreover, his interrogation of Mayfield concerning whether the Union was harassing him and asking him to report any further harassments to Westmoreland or to himself was consistent with the conduct of Todd and Mark McClellan, Hamm, and Westmoreland in the campaign to decertify the Union. Moreover, the supervisors were allowed to carry out those activities during the employees' working time on the employer's premises. Thus, I find that Baker Bros., Inc. bears responsibility for each of these violations.

14. Respondent Baker Bros., Inc.'s Response to Handbilling by Local 1529 on January 19, 1983, at Bakers Big Star No. 64

Joe Price, Jr., a representative of the United Food and Commercial Workers International Union, testified that on January 19, 1983, he and two members of Local 1529 went to Bakers Big Star No. 64 which was located in a shopping center at South Perkins and Knight Arnold Roads and offered union handbills to customers at Bakers Big Star. The shopping center consists of approximately 20 stores and also includes another grocery store. Price testified that they offered handbills to customers and did not attempt to stop the customers or get in their way. The handbills consisted of a price comparison between Kroger

and Bakers Big Star on several items (G.C. Exh. 54, TR 1877). They commenced handbilling at approximately 2 p.m. on the sidewalk in front of Bakers Big Star No. 64 and stayed to the side of each entrance to the store and did not block the entrance and did not have any physical contact with or make any derogatory remark to any customer. Price testified that the sidewalk was approximately 8 to 10 feet wide in front of the store. Bob Bruce, the manager of Bakers Big Star No. 64, acknowledged that he telephoned the police and asked them to handle a handbilling problem in front of the store. At about 4 p.m. two policemen arrived at the store and threatened to arrest Price and the other two handbillers if they did not move as they were on Baker's leased property. The police then told them they must picket at the entrance of the shopping center. They then did so and remained there until approximately 7 p.m. The entrance to the shopping center was approximately 50 yards from the sidewalk to the store, and in order to enter the shopping center, drivers were required to pull in quickly as automobiles were moving in a line almost continuously into the entrance from the street which was heavily trafficked. Customers were required to pull in their automobiles quickly or be subject to possible collision. As a result, the cars turned into the entrance and it was difficult to provide them with a handbill. The handbills specifically related to a dispute with Bakers Big Star rather than with any of the other tenants of the shopping center.

I find that Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act by calling the police and causing the handbillers to leave the immediate sidewalk area in front of Bakers Big Star No. 64. I have considered the Section 7 rights of the handbillers to hand out messages on behalf of the Union and the private property rights of the leaseholder (Bakers). It is clear that the Union's dispute was with Bakers and that the Union had the right to engage in informational handbilling at a place where it could reasonably expect its handbilling to have the most

effect. *Giant Food Markets, Inc.*, 241 NLRB 727, 728-9 (1979). It is also clear that the intended audience of the handbillers were the customers of Bakers Big Star, Inc. and this intended audience was readily identifiable only at such times they actually decided to enter Bakers Big Star, Inc. which was only one of 20 stores in the shopping center. The most reasonable method for the Union to get its message across was to stand on the sidewalk near Bakers Big Star No. 64. The alternative of attempting to handbill at the entrance of the shopping center was unreasonable under the circumstances as it created a danger for oncoming motorists and rendered the handbilling highly inefficient. Most motorists did not stop to take the handbills and those who did so may have been customers of the other stores in the shopping center. The placement of the handbillers at the shopping center was more detrimental to neutral employers than if the handbillers were stationed in front of Bakers Big Star No. 64. As Bakers Big Star No. 64 holds its public areas out to potential customers it has diminished property rights. The handbillers, but for the fact that they were handing out handbills on behalf of the Union, would have otherwise been welcome as potential customers at the store. *Montgomery Ward*, 265 NLRB No. 8 (1982); *Giant*, supra. Accordingly, I find that by interfering with the handbillers' Secton 7 rights, Baker Bros., Inc. violated Section 8(a)(1) of the Act.

15. The Overall Course of Conduct of Baker Bros., Inc.

I find that Baker Bros., Inc.'s course of conduct by the circulation of the decertification petition, the interrogation of its employees, the threats, and promise of benefits made in order to convince the employees to decertify the Union all in violation of Section 8(a)(1) in Bakers' efforts to rid itself of Local 1529 was inconsistent with its obligation to bargain with Local 1529 as the collective bargining representative of its employees. As such, I find that Baker Bros., Inc. violated Section 8(a)(5) and (1) of the Act by its

course of conduct to undermine Local 1529 as the bargaining representative of its employees. *Tony DeClue, an individual d/b/a Liberty Cleaners,* 227 NLRB 1296, 1303 (1977).

G. Independent Allegations of Violations By Respondents Pic-Pac, Inc., and Giant Foods, Inc., Contemporaneous With and Subsequent to the Withdrawal of Recognition

1. The November Meetings of Respondents Giant and Pic-Pac Representatives with their Employees

After the withdrawal of recognition from the Union in November 1982, Respondents Giant and Pic-Pac representatives met with employees at their stores and distributed booklets describing employee benefits (G.C. Exh. 74; C.P. Exhs. 26 and 27). In addition, another booklet for Giant's part-time employees was distributed. Melba Chesteen testified that in November 1982, she was working at Pic-Pac No. 11 and was present at a meeting where the Union was discussed among part-time checkers. The meeting was conducted by Larry Keith, a Pic-Pac supervisor, who commenced the meeting by informing the employees that Pic-Pac and the Union were in court, and that as of that day, they were no longer represented by a union, but Pic-Pac would continue to deduct their union dues and would put them in a separate trust fund. He also told them that if Pic-Pac won the court decision, the dues would be returned to the employees with interest, but if the Union won, they would get nothing. Keith also informed them that in prior meetings, employees had asked how they could get out of the Union and that they would have to send a certified letter to Bill Creech, the division manager of Pic-Pac, stating that they no longer wanted union dues withheld from their checks and would have to send one to the Union stating the same thing. No one asked questions and Keith then handed out literature. She also recalled on

further questioning by the General Counsel that Keith stated that as of that date, everyone would receive a 50-cents raise on the upcoming paycheck, and that in the future, there would be more. I credit Chesteen's testimony which is unrebutted as Keith did not testify.

DeLois Barnett and Mary Houston, who were both full time checkers at Pic-Pac No. 11, testified that they were present at a meeting attended by full time employees on either November 8 or 9, 1982, held by Larry Keith, a Pic-Pac supervisor. Keith told the employees that they no longer had a union as the company did not recognize the new union and the old union no longer existed, but they would have the same benefits as under the present union contract with the exception that they would receive a raise and, further, the full time employees would be given a retirement benefit which the previously did not have. He also told them that as far as Pic-Pac was concerned, they were union free but their union dues would continue to be withheld and put in a special fund which would draw interest, and if the courts decided for Pic-Pac, the employees would get the money back with interest. If the matter were decided for the Union, the Union would get the money. Keith was asked by the employees what would occur if they went on strike if the Union told them to walk out, and Keith replied that if the employees walked out, they might as well keep walking because he could assure them they would never hold a position with Pic-Pac again, and that he could have a new crew in their place within an hour. Keith also informed them that Pic-Pac had instituted a hot line to answer employee questions. Houston also testified that she saw a notice in the store concerning the retirement plan which was posted near the time clock about a week or two after the meeting in November 1982. I credit the testimony of Barnett and Houston, which testimony is unrebutted as Keith did not testify.

Donald Gilmore, a part-time employee at Giant employees which was one of four meetings held for Giant

employees approximately one or two weeks after a letter was sent from Giant indicating that it no longer recognized the Union. At this meeting, Giant's Division Manager LaRue spoke and the meeting was also attended by Store Manager Ashe. LaRue read from a prepared text and stated that since Local 452 had ceased to exist, there was an illegal merger, that there was a legal question over the merger, and, therefore, Giant Foods did not recognize Local 1529 as the bargaining agent of the employees, did not feel compelled to negotiate with Local 1529, had filed a lawsuit, and the Union would file a counter lawsuit, and that Giant would continue collecting their union dues and deposit them in an escrow account and that the employees no longer needed the Union because the Union had not done anything for them. He further told the employees that Giant was a fair employer and then stated that he would show them how fair Giant was as he was giving them a raise which he then announced. LaRue also told them that he had their guaranteed contract and they did not need a Union to negotiate their contract because Giant was a fair employer. LaRue had a small booklet that stated the employees were guaranteed a good job at a fair wage and a paid vacation. LaRue also informed the employees that Giant was setting up a hot line and if they had any disputes, they did not have to bother with the Union, but could call Giant representatives directly through the hot line and the matter could be worked out with either the store manager or with the division manager. LaRue also informed them that the employer was attempting to start a pension plan for full-time employees which would not affect part-time employees. After reading from the prepared text, LaRue stated that if they did not wish to have their dues deduction deposited in an escrow account, they could obtain them by going to the office next door and signing a slip of paper to withdraw from the Union.

LaRue acknowledged that shortly after the withdrawal of recognition, Giant gave wage increases to its employees. He believes it was approximately 2 to 4 days

afterward. There was also a new grievance procedure instituted as was the production and printing of employee benefit booklets. Additionally, there was a new pension plant implemented for grocery employees. Giant has since refused to accept any grievances from Local 1529 and that policy has continued until the date of the hearing. I credit the testimony of Gilmore which is unrebutted as LaRue did not specifically address the contents of this meeting, nor did he dispute in his testimony that the grievance procedure was changed, raises were given to employees, or that a pension plan was instituted.

I find that Respondents Giant and Pic-Pac as set out in the meeting above violated Section 8(a)(1) of the Act following their withdrawals of recognition from the Union by soliciting their employees to withdraw from the Union by telling them that their continued contributions to the Union would be withheld although they would not be accorded the benefits of union representation because Respondent no longer recognized the Union and by volunteering instructions to the employees for their withdrawal from the Union. *Tunica Manufacturing Company, Inc.*, 236 NLRB 907 (1978).

2. The Meeting at Giant Store No. 5 Between Employee Hurdle and Store Manager Bradford

Hurdle, who is employed at Giant Store No. 5 as a sacker, testified that he attended a mandatory meeting for Giant store employees at which the employees were informed by the employer's representative that Giant no longer recognized Local 1529, which meeting I find to have occurred in November 1982. After this meeting, Store Manager Bradford spoke to him on the same date. Bradford asked Hurdle to come into his office and then asked Hurdle how he thought everything would work out with the Union situation. Hurdle replied that the employees were having problems finding out when the union meetings were. Brad-

ford told Hurdle that if he were dissatisfied with the Union and wanted to leave, he could write the Union and tell them he no longer wanted to be in the Union and that would be the end of it. I credit Hurdle's testimony which is unrebutted as Bradford did not testify. [6] I find that Giant violated Section 8(a)(1) of the Act through the interrogation of Hurdle by Bradford concerning his attitude and Union sympathies on how the dispute with the union would be resolved, and that said Respondent also violated Section 8(a)(1) of the Act when Bradford solicited Hurdle to withdraw from the Union and instructed him how to do so.

3. The Conversation Between Donald Gilmore and Giant Food Store No. 4 Manager Joe Ashe

Gilmore, an employee at Giant Food Store No. 4, testified that Joe Ashe is the store manager and the highest ranking person in authority at Giant Store No. 4 and is in charge of all personnel operations in the store, including the filling out of disciplinary action forms and has the authority to fire employees. In early October 1982, Gilmore obtained a letter from the Union which stated that there was a problem in negotiationg the contract (with Giant). Gilmore was in the office looking at the schedule and asked Ashe if he knew anything about the letter. Ashe stated he did not and asked what letter Gilmore was referring to and asked Gilmore to show him the letter. Gilmore showed Ashe the letter, and Ashe asked if he could borrow it and said he would return it after he was finished with it. He then asked Gilmore to keep him informed of any further developments in the labor dispute. Gilmore discarded the letter himself after he received it back.

---

[6] I also credit Hurdle's unrebutted testimony that Bradford was manager of Store No. 5 and scheduled and granted vacation days, directed the employees, told the employees when to go on breaks, and was the highest ranking management representative at the store. I find that Bradford was a supervisor within the meaning of Section 2(11) of the Act.

I credit Gilmore's unrebutted testimony as set out above. I find that Ashe was a statutory supervisor within the meaning of Section 2(11) of the Act, as he is the highest ranking person in authority at the store. I find that Respondent Giant Food violated Section 8(a)(1) of the Act by Ashe's request that Gilmore keep him informed about any further developments concerning the labor dispute.

4. The Conversation Between Checker Allie Conard and Pic-Pac Store No. 14's Assistant Manager Noel Knott

Allie Conard testified that on the Thursday before Thanksgiving 1982, Knott returned from a manager's meeting and Conard asked him how the meeting had gone. Knott replied that the managers had been chewed out during the meeting by Creech who had told them that the store was not making any money. During the course of this conversation, Knott also informed Conard that Creech had told the managers that the day the employees took a strike vote was the day Respondent Pic-Pac would begin laying off the employees. Creech is an admitted supervisor. Conard also testified that as the assistant manager of Store No. 14, Knott and the other assistant store managers made out work schedules, did not punch the time clock, utilized an office, told the employees when to take lunch breaks, were in charge of time cards, asked the employees if they wanted to go home early when business was slow, and attended manager meetings.

Knott did not testify. I credit the unrebutted testimony of Conard and, I find that Knott is a supervisor within the meaning of Section 2(11) of the Act. I further find that Respondent Pic-Pac violated Section 8(a)(1) of the Act by Knott's relay of Creech's statement that employees would be laid off if a strike vote were taken by the employees. This statement was clearly a threat that the employees would be laid off if they chose to exercise their Section 7 rights to strike.

5. The Meeting of January 15, 1983

Conard testified that Manager Creech talked in general about the hearing and the Union, and stated that if the employees decided to take a strike vote, that Respondent Pic-Pac would commence laying employees off. According to Conard, Creech brought up the subject of a strike. Although Creech testified at the hearing, he did not address any statements made at this meeting. I credit the testimony of Conard which is unrebutted. I thus find Respondent, through the issuance of a threat of layoffs to its employees if they chose to exercise their Section 7 rights to engage in a strike, violated Section 8(a)(1) of the Act.

H. The Unilateral Changes

The evidence established, and it is undisputed, that in conjunction with their withdrawal of recognition from and refusal to bargain with the Union, the Respondents implemented certain unilateral changes in terms and conditions of employment of their employees and without furnishing notice thereof to the Union and without affording the Union an opportunity to bargain concerning those changes. Specifically, Respondent Gilbert Allen Big Star unilaterally instituted wage increases and refused to furnish information to the Union. Respondents Sewell's Big Star, Sewell-Allen, and Sewell Allen No. 2 unilaterally instituted wage increases, refused to process grievances filed by the Union, denied access of Union representatives to their stores and refused to furnish information to the Union. Respondent Bakers instituted wage increases, refused to process grievances filed by the Union, failed to deduct and remit union dues to the Unions required by the terms of its expired labor agreement, and refused to furnish information to the Union. Respondent SMF instituted wage increases, refused to process grievances, and refused to furnish information to the Union. Respondents Giant and Pic-Pac instituted wage increases, instituted a new pension plan for its full-time employees, refused and failed

to remit union dues deducted from their employees to the Union as required by the terms of their expired labor agreement, denied access of union representatives to its employees in its stores, refused to process grievances filed by the Union, instituted a new grievance procedure, instituted a change in insurance carrier for its meat department employees, and refused to furnish information to the Union.

All Respondents stipulated that at the time of the implementation of the wage increases, the current financial condition of their stores was not a factor in determining the amount of the increases. Giant and Pic-Pac also stipulated that at the time of the implementation of the pension plans for full-time employees, the current financial condition of their stores was not a factor in determining the amount of the wage increases. Respondents contend that the wage increases were implemented in accordance with their determination that a wage increase was due at the time. It is also undisputed that the Respondents did not comply with the request of John Sheppard in July 1982 for information with which to bargain concerning the new labor agreement in the fall of 1982. Additionally, Respondent Giant instituted a new notice on vacation policies. Although Giant Manager John LaRue contended this notice was merely an affirmation of the existing policy, Union Representative Mancini contended otherwise. I find that the posting of said notice by Giant constituted a unilateral change in the terms and conditions of employment of its employees.

I find that each of the changes in the terms and conditions of employment as set out above by the Respondents constituted separate violations of Section 8(a)(5) and (1) of the Act as the Respondents had an obligation to furnish notice of these changes and bargain with the Union, but in accordance with their rejection of the Union as the collective bargaining representative of their employees refused and failed to do so. I find that each of the Respondents thereby violated Section 8(a)(5) and (1) of the Act by the

implementation of each of the unilateral changes by it.

V. The Effects of the Unfair Labor Practices Upon Commerce

The unfair labor practices as found herein in Section IV above, in connection with the business of Respondents as found in Section I above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes obstructing the free flow of commerce.

Conclusions of Law

1. Respondent Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc.; Gilbert Allen Big Star, Inc.; Pic-Pac, Inc.; and Giant Foods, Inc., are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers, AFL-CIO, Local 1529, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

4. The following employees of Respondent Sewell-Allen Big Star, Inc., d/b/a Sewell-Allen Big Star No. 189, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

5. The following employees of Respondent Sewell-Allen Big Star, Inc. No. 2, d/b/a Sewell-Allen's Big Star No. 103, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

6. The following employees of Respondent Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

7. The following employees of Respondent SMF Management, Inc., d/b/a SMF Food Rite Supermarkets, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All head meat cutters, journeymen meat cutters, apprentices and wrappers.

8. The following employees of Respondent Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

9. The following employees of Respondent Pic-Pac, Inc., constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrappers.

10. The following employees of Respondent Giant Foods, Inc., constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrappers.

11. The following employees of Respondent Pic-Pac, Inc., constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All employees except meat market and professional employees.

12. The following employees of Respondent Giant Foods, Inc., constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All employees except meat market and professional employees.

13. At the election held by United Food and Commercial Workers International Union, AFL-CIO, Local 452 among its members in February 1982 to merge with United Food and Commercial Workers International Union, AFL-CIO, Local 1529, unit included employees who were not members of Local 452 were denied the right to vote. As a consequence thereof, the merger between Local 452 and Local 1529 whereby Local 1529 was to be the successor and surviving union was invalid.

14. Each of the Respondents had knowledge of the merger in April 1982 and recognized Local 1529 as the successor of Local 452 and continued to do so until after the expiration of their collective bargaining agreement(s) with Local 452 on October 31, 1982.

15. On or about November 8, 1982, Respondents Sewell's Big Star, Inc.; Sewell Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc., SMF Management, Inc.; Gilbert Allen Big Star, Inc.; Pic-Pac, Inc.; and Giant Foods, Inc., each withdrew recognition from and refused to bargain with Local 1529 as the collective bargaining representative of their employees in the above appropriate units.

16. As a result of their voluntary recognition of Local 1529 as the successor of Local 452 as the collective bargaining representative of their employees and their failure to withdraw recognition from the Union until more than 6 months after their voluntary recognition of Local 1529 in April 1982, each of the Respondents is barred by Section 10(b) of the Act from raising the lack of majority status of Local 1529 as a defense to the unfair labor practice charges against them stemming from their withdrawal of recognition from Local 1529.

17. By reason of their delay in withdrawing recognition from Local 1529 until after the expiration of their collective bargaining agreements with Local 452, each of the Respondents is estopped from withdrawing recognition from Local 1529 by challenging the validity of the merger.

18. Respondents Sewell-Allen Big Star, Inc., d/b/a Big Star No. 189 and Sewell-Allen Big Star, Inc. No. 2, d/b/a Big Star No. 103 are a single employer.

19. By their withdrawal of recognition in November 1982 and continuing refusal to bargain with Local 1529 as

the collective bargaining representative of their employees in the appropriate units as found above, and to furnish information to the Union for bargaining, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc.; Gilbert Allen Big Star, Inc.; Pic-Pac, Inc.; and Giant Foods, Inc., violated Section 8(a)(5) and (1) of the Act.

20. By its June 28, 1982, solicitation of its employee Johnnie Worrell to withdraw as a member of Local 1529 and its promise of improvements in working conditions if he did so, Respondent Sewell-Allen Big Star, Inc. No.2, violated Section 8(a)(1) of the Act.

21. By is June 30, 1982, solicitation of its employee Worrell to withdraw from the Union, by its promise of improvements in benefits if he did so, and by its issuance of a threat of store closure if the employees did not abandon the Union, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(1) of the Act.

22. By its July 12, 1982, solicitation of employee Worrell to withdraw from the Union, and by its issuance of an unspecified threat to Worrell regarding his future; by its statement that it would be unable to bargain with Union President Sheppard; by its threat of plant closure if Worrell and the other employees remained in the Union; and by its promises of improvements in wages and benefits if the employees abandoned the Union, Respondent Sewell-Allen Big Star, Inc. No.2, violated Section 8(a)(1) of the Act.

23. By its July 26, 1982, interrogation of employee Worrell concerning whether he had decided to withdraw from the Union; its threat of the futility of continued representation by the Union; and by its implied promise of improvements in benefits and other terms and conditions of employment if its employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc. No. 2, violated

Section 8(a)(1) of the Act.

24. By its late July 1982 solicitation of employees Thomas Shelton, Jr., and Michael Rowley to withdraw from the Union; its promise of improvements in their retirement and insurance benefits if they did so; and its threat of less desirable working hours and loss of employment if they did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(1) of the Act.

25. By its early August 1982 solicitation of its employees Herbert Bobbitt, James Kimbrough, and Worrell to withdraw from the Union; its threat of the futility of continued Union representation as it would not allow Union President Sheppard in its store; and by its promise of improvements in wages and benefits if the employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(1) of the Act.

26. By its mid-August 1982 interrogation of its employees Worrell, Kimbrough, Shelton, Rowley, and Mary Armour concerning their support of the Union; its solicitation of its employees to withdraw from the Union; its representation to the employees that it would not bargain with or sign a labor agreement with Union President Sheppard demonstrating the futility of the employees' continued support of the Union; its promises of improvements in pension benefits if the employees withdrew from the Union; and by its threat of discharge to employee Kimbrough if he did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8()a)(1) of the Act.

27. By its solicitation of its employee, William Garland, in August 1982 to withdraw from the Union and that Garland solicit the withdrawal of its other employees from the Union; by its promise of improvements in benefits if the employees withdrew from the Union; by its subse-

quent mid-August 1982 interrogation of its employees Garland, Bobby Thurman, and Jim Perry concerning their sentiments with respect to the circulation of the decertification petition; by its solicitation of said employees to withdraw from the Union; by its promise of improvements in wages and benefits if they withdrew from the Union; by its statement that it would not negotiate with or sign a labor agreement with Union President Sheppard and the Union; and by its threat of a strike by the Union, Respondent Sewell-Allen Big Star, Inc., violated Section 8(a)(1) of the Act.

28. By its solicitation of employee Mary Fortner in late August 1982 to bypass her collective bargaining representative and to bring grievances to the attention of its management, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(1) of the Act.

29. By its solicitation of its employee Leroy Dancer to witdraw from the Union; by its promise to give him additional working hours if he did so; and by its solicitation and sponsorship of the filing of the decertification petition by Dancer, Respondent violated Section 8(a)(1) of the Act.

30. By the discharge of its part-time employees Bill Gross, Theresa Heist, and Becky Hordyk; and by its demotion of head meat cutter Johnnie Worrell to journeyman meat cutter in August 1982, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(3) and (1) of the Act.

31. By its discharge of employee James Kimbrough, Respondent Sewell-Allen Big Star, Inc. No. 2, violated Section 8(a)(3) and (1) of the Act.

32. By their implementatin of unilateral changes in the terms and conditions of employment of their employees following the withdrawal of recognition from Local 1529 by the unilaterial granting of wage increases to their employees, refusing to accept or process grievances filed by

the Union, their denial of access of Union representatives to their employees at their stores; and by refusing to furnish information to the Union, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; and Sewell-Allen Big Star, Inc. No. 2, violated section 8(a)(1) and (5) of the Act.

33. By their unlawful course of conduct initiated in the summer of 1982 and continuing thereafter, whereby Respondent Sewell-Allen Big Star, Inc., engaged in violations of Section 8(a)(1) and (5) of the Act and Respondent Sewell-Allen Big Star, Inc. No. 2, engaged in violations of Section 8()a)(1), (3) and (5) of the Act, each of said Respondents has engaged in an unlawful course of conduct inconsistent with its obligation to bargain with Local 1529 as the collective bargaining representative of its employees, and has thereby committed a separate violation of Section 8(a)(5) and (1) of the Act.

34. By its interrogation of its employee William Mayfield in June 1982 concerning whether he was a member of the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

35. By its solicitation of its employee Mayfield in August 1982 to sign a petition to decertify the Union; by its promise to Mayfield of improvements in wages and benefits if the Union were decertified; and by its threat that it would not sign another contract with the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

36. By its solicitation of its employee Roy Needham to sign a petition to decertify the Union; and by its threat of discharge issued to Needham if he engaged in a strike, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

37. By its solicitation of employees Richard Floyd and Mary Jane Monasco to sign a petition to decertify the

Union; by its promise of improved working conditions if the employees abandoned the Union; and by its statement that it would no longer honor the labor agreement with the Union, Respondent Baker Bros., Inc., violated Section 8(a(1) of the Act.

38. By its solicitation of its employees Vickie Mason and Patricia Doty to sign the decertification petition; and by its statement to these employees that a new labor agreement would not be signed with the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

39. By its solicitation of its employee Randy Inman to sign the decertification petition; and by its statement to Inman that it would be a nonunion company and that the Union was out, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

40. By its solicitation of its employee Robert Travis to sign a decertification petition; and by its implied promise of a wage increase if the employees chose to decertify the Union, Respondent Baker Bros., Inc , violated Section 8(a)(1) of the Act.

41. By its interrogation of employee Mayfield on August 5, 1982, as to whether he had attended a Union meeting; by its threat to Mayfield that if he voted for the Union, he would either lose his job or have his working hours reduced; and by its promise of job security if Mayfield voted to decertify the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

42. By its interrogation of employee Mayfield concerning his union activities; and its solicitation of Mayfield to bypass his bargaining representatives and notify management of contacts by the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

43. By the statements of its President Al Baker to

the employees of Bakers Big Star No. 81 in August 1982, that the Company would run smoother as soon as he could get rid of the interruptions (Union), Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

44. By its solicitation of employees Monasco and Floyd to sign a second decertification petition, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

45. By its sponsorship and circulation of two petitions to decertify the Union, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

46. By its interference with the rights of handbillers to distribute Union handbills on the sidewalk area in front of Bakers' Big Star Store No. 64, Respondent Baker Bros., Inc., violated Section 8(a)(1) of the Act.

47. By its implementation of unilateral changes in the terms and conditions of employment of its employees following the withdrawal of recognition from Local 1529 by the unilateral granting of wage increases; refusing to accept or process grievances filed by the Union; and deducting union dues from its employees and its failure to remit them to the Union; and by refusing to furnish information to the Union; Respondent Baker Bros., Inc., violated Section 8(a)(5) and (1) of the Act.

48. By its unlawful course of conduct in its attempt to rid itself of the Union, which was inconsistent with its obligation to bargain with the Union, Respondent Baker Bros., Inc., violated Section 8(a)(5) and (1) of the Act.

49. By its implementation of unilateral changes in the terms and conditions of employment of its employees following its withdrawal of recognition from the Union; by the granting of wage increases; and by refusing to furnish information to the Union; Respondent Gilbert Allen Big Star, Inc., violated Section 8(a)(5) and (1) of the Act.

50. By its implementation of unilateral changes in the terms and conditions of employment of its employees following the withdrawal of recognition from the Union by the granting of wage increases; its refusal to furnish information to the Union; and by its refusal to process grievances; Respondent SMF Management, Inc., violated Section 8(a)(5) and (1) of the Act.

51. Respondents Giant Foods, Inc., and Pic-Pac, Inc., are, and have been at all relevant times herein, a single employer under the Act.

52. By the solicitation of their employees to withdraw from the Union following their withdrawal of recognition from the union, Respondents Giant Foods, Inc., and Pic-Pac, Inc., violated Section 8(a)(1) of the Act.

53. By the implementation of unilateral changes in the terms and conditions of employment of their employees following their withdrawal of recognition from the Union in November 1982, by granting wage increases to their employees; by their institution of pension plans for their full-time employees; by their failure to remit union dues to the Union in accordance with the terms of their expired labor agreements; by their denial of access of union representatives to their employees during working hours; by their refusal to accept or process grievances; by their institution of new grievance procedures; by their refusal to furnish information to the Union; and by their change of insurance carrier for their employees in their meat departments, Respondents Giant Foods, Inc., and Pic-Pac, Inc., violated Section 8(a)(5) and (1) of the Act.

54. By its unilateral change in its vacation policy for its employees, Respondent Giant Foods, Inc., violated Section 8(a)(5) and (1) of the Act.

55. By its interrogation of employee Stanley Hurdle concerning his union sentiments and its solicitation of

Hurdle to withdraw from the Union, Respondent Giant Foods, Inc., violated Section 8(a)(1) of the Act.

56. By its solicitation of employee Donald Gilmore to keep it informed concerning the Union, Respondent Giant Foods, Inc., violated Section 8(a)(1) of the Act.

57. By its threat of layoff if the employees chose to strike relayed to employee Allie Conard in November 1982, Respondent Pic-Pac, Inc., violated Section 8(a)(1) of the Act.

58. By its threat of layoff if the employees chose to strike issued to its employees at a meeting on January 15, 1983, by its Manager Bill Creech, Respondent Pic-Pac, Inc., violated Section 8(a)(1) of the Act.

59. The above unfair labor practices have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have engaged in violations of the Act, it will be recommended that Respondents cease and desist therefrom and take certain affirmative actions designed to effectuate the pourposes and policies of the Act and post the appropriate notices.

In accordance with my findings that Respondents unlawfully withdrew recognition from Local 1529 following the expiration of their collective bargaining agreements with Local 452, I shall order Respondents to rescind their withdrawal of recognition, and make any and all payments which would have otherwise been due under the terms of their expired labor agreements, including the payment of union dues to the Union which were unlawfully withheld by certain of Respondents. The Board does not require that employees suffer the loss of increases in wages and im-

provements in benefits under circumstances as have occurred in these cases regarding the wage increases and various improvements or increases in existing benefits or implementation of new benefits, and I, accordingly, do not recommend that the increases in wages and improvements or increases in benefits or implementation of new benefits by Respondents after their withdrawal of recognition be rescinded. *Kendall College*, 228 NLRB 1083 (1977); *Dura-Vent Corporation*, 257 NLRB 430 (1981); and *Pace Oldsmobile, Inc.*, 256 NLRB 1001 (1981). I do, however, recommend that all other terms and conditions of Respondents' collective bargaining agreements which expired on October 31, 1982, be reinstated to the status quo ante until Respondents fulfill their obligations by bargaining, upon request, with the Union as the collective bargaining representative of their employees in the appropriate units, and either reach and execute, written agreements with the Union, or, until a valid impasse occurs. I further recommend that Respondents be ordered to furnish the information requested by the Union necessary for it to bargain, upon request by the Union, within a reasonable period after said request.

I further recommend that Respondent Sewell-Allen Big Star, Inc. No. 2's discharge of employees Bill Gross, Theresa Heist, Becky Hordyk, and James Kimbrough, and the demotion of employee Johnnie Worrell, be rescinded, and that said Respondent expunge its personnel records of all references thereto and make the aforesaid employees whole with respect to any loss of seniority, earnings, and benefits which they may have incurred by reason of Respondent's unlawful actions against them.

All loss of earnings and benefits suffered by any employees of Respondents by reason of Respondents' withdrawal of recognition from the Union and refusal to bargain with the Union, and by the Union and/or employees by reason of Respondents' refusal to remit union dues as found above, and suffered by employees

Gross, Heist, Hordyk, Kimbrough, and Worrell by reason of the discrimination by Respondent Sewell-Allen Big Star, Inc. No. 2, against them shall be computed with interest in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

Respondents' withdrawal of recognition and refusal to bargain, as found above, constituted a complete rejection of the Union and of their employees' rights to representation for purposes of collective bargaining. Moreover, Respondents Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star, Inc. No. 2, and Baker Bros. Inc., committed numerous violations of the Act in disregard of the rights of their employees under the Act. I, accordingly, find that all of Respondents' conduct in repudiating the Union goes to the heart of the collective bargaining relationship and the Section 7 rights of their employees under the Act. I, accordingly, recommend that a broad order be issued to each of the Respondents requiring it to cease and desist from violating the Act in any other manner. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). I also recommend that Respondents be ordered to preserve and make available to the Board or its agents, upon request, for inspection and copying, all records necessary to determine the payments due and owing by Respondents under the terms of this Order, and to insure that Respondents have otherwise fully complied with the terms of this Order.

ORDER[8]

Respondents Sewell's Big Star, Inc.; Sewell-Allen

---

[7] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 761 (1962).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc.; Gilbert Allen Big Star, Inc.; Giant Foods, Inc.; and Pic-Pac, Inc., their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Withdrawing recognition from and refusing to bargain in good faith with United Food and Commercial Workers, Local 1529.

(b) Failing and refusing to abide by the terms of their expired labor agreements with the Union, until such time as an agreement is reached with the Union, or an impasse is reached.

(c) Failing and refusing to meet and bargain in good faith with the Union.

(d) Failing and refusing to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

(e) Unilaterally granting to employees increases in wages.

(f) Respondents Giant Foods, Inc., and Pic-Pac, Inc., a single employer, shall further cease and desist from interrogationg their employees concerning their union sentiments; soliciting their employees to withdraw from the Union; threatening their employees with discharge if they engage in a strike; refusing access of the Union's representatives to their stores and employees; unilaterally implementing pension plans for their full-time employees; unilaterally instituting changes in vacation policies; refusing to process grievances; unilaterally instituting a new grievance procedure; unilaterally instituting a change of insurance carrier for employees in their meat departments; and failing to remit dues to the Union pursuant to their expired labor agreements.

(g) Respondent SMF Management, Inc., shall further cease and desist from refusing to process grievances.

(h) Respondent Baker Bros., Inc., shall further cease and desist from interrogating its employees concerning their union sympathies; soliciting the withdrawal of its employees from the Union; promising increases in wages and benefits, increased job security, and improvements in their terms and conditions of employment if the employees withdraw from the Union; threatening its employees with the futility of continued support of the Union; threatening its employees with loss of jobs, discharge, or adverse changes in their terms and conditions of employment if they continue to support the Union; sponsoring the circulation of petitions among its employees to decertify the Union as their collective bargaining representative; directing their employees to bypass their collective bargaining representatives and bring contacts by the Union directly to the attention of management; failing to remit dues to the Union under the terms of the expired labor agreement; denying access of Union representatives to its employees; refusing to process grievances; and engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(i) Respondent Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star, Inc. No. 2, a single employer, shall further cease and desist from interrogating their employees concerning their Union sympathies; soliciting their employees to withdraw from the Union or to sign a petition to decertify the union; sponsoring the circulation of a petition to decertify the Union; promising their employees increases in wages, benefits, working hours, improvements in their terms and conditions of employment if they sign the decertification petition or abandon the Union as their collective bargaining representative; telling its employees that the Union will strike; issuing threats of discharge, threats of store closure, statements that it will not bargain

with or sign a labor agreement with Union President Sheppard or with the Union; demoting or discharging their employees in order to further its unlawful sponsorship of the petition to decertify the Union and discharging or demoting employees because said employees oppose Respondents' unlawful conduct or to otherwise further its attempts to rid itself of the Union; refusing to process grievances; denying Union representatives access to its employees; and from engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(j) Respondent Sewell's Big Star, Inc., shall further cease and desist from refusing to accept or process grievances filed by the Union, and denying access of the Union's representatives to its employees.

(k) Respondents shall not in any other manner interfere with, restrain, or coerce their employees in the exercise of their rights guaranteed them under Section 7 of the Act.

2. Respondents shall take the following affirmative actions designed to effectuate the policies and purposes of the Act:

(a) Recognize and, upon request, meet and bargain with United Food and Commercial Workers, AFL-CIO, Local 1529, concerning the terms and conditions of employment of their employees in the aforesaid appropriate units.

(b) Furnish to the Union, upon request, relevant information in order to enable it to bargain on behalf of their unit employees.

(c) Make their unit employees whole for any loss of wages or benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union

and refusal to bargain by Respondents and by reason of any unilateral changes instituted by Respondents in their terms and conditions of employment.

(d) Reinstate the existing terms of their expired labor agreements until such time as they have bargained in good faith with the Union and have reached a new agreement or a valid impasse. Nothing herein shall require Respondents to rescind any increases or improvements in wages or benefits or the implementation of new benefits previously granted.

(e) Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Sllen Big Star, Inc. No. 2; Giant Foods, Inc.; and Pic-Pac, Inc., shall reinstate their practice of permitting access to their employees by representatives of the Union during the working hours of their employees in non-customer areas.

(f) Respondents Giant Foods, Inc.; Pic-Pac, Inc.; and Baker Bros., Inc., shall make whole the Union for all loss of dues, with interest, suffered by reason of said Respondents' failure or refusal to remit said dues following their withdrawal of recognition from the Union, and thereafter, remit union dues in accordance with the terms of their expired labor agreements.

(g) Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc.; Giant Foods, Inc.; and Pic-Pac, Inc., shall process grievances in accordance with the terms of their expired labor agreements.

(h) Respondent Sewell-Allen Inc. No. 2, shall offer to Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnnie Worrell immediate and full reinstatement to their former positions, or, if those positions are no longer available, to substantially equivalent positions without prejudice to their seniority and other

rights and privileges previously enjoyed, and make said employees whole for all loss of wages and benefits they incurred by reason of said Respondent's unlawful discrimination against them in the manner set forth in this decision entitled "The Remedy," and expunge from its files all references to the discharges of Gross, Heist, Hordyk, and Kimbrough, and to the demotion of Worrell.

(i) All Respondents shall preserve and, upon request, make available to the Board for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to comply with the terms of this Order.

(j) Post at their facilities copies of the attached notices as designated for each Respondent marked "Appendices A through H."[9] Copies of the notice on forms provided by the Regional Director for Region 26, after being duly signed by their authorized representatives, shall be posted immediately upon receipt and maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(k) Each Respondent shall notify the Regional Director for Region 26 in writing within 20 days from the

---

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

date of this Order what steps it has taken to comply with this Order.[10]

Dated, Washington, DC May 4, 1984.

/s/ Lawrence W. Cullen

Lawrence W. Cullen
Administrative Law Judge

---

10 Respondents have filed various motions to dismiss the complaints and exclude evidence. I find them to be without merit, and they are hereby denied.

APPENDIX A (attachment of APPENDIX A)

JD—(ATL)—38—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such

time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT deny reasonable access of union representatives to our employees in non-customer areas during working hours.

WE WILL NOT unilaterally grant to out employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529, as their collective bargaining representative or to refrain from doing so.

SEWELL'S BIG STAR, INC., d/b/a BIG STAR NO. 187

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

APPENDIX B (attachment to Appendix A)

NOTICE TO EMPLOYES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post this notice and abide by its terms.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail and refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT deny reasonable access of union representatives to our employees in non-customer areas during working hours.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrogate our employees concerning their union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective bargaining representative; or solicit our employees to circulate or sign said petition with promises of increases in wages or benefits or improved working conditions; or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective bargaining representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529 as their collective bargaining representative or to refrain from doing so.

A-157

SEWELL-ALLEN BIG STAR, INC.,
d/b/a BIG STAR NO. 189

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

APPENDIX C (attachment to Appendix A)
JD—(ATL)—38—84

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post this notice and abide by its terms.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail and refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any of the other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT deny reasonable access of Union representatives to our employees in non-customer areas during working hours.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrogate our employees concerning their union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective bargaining representative; or solicit our employees to circulate or sign said petition with promises of increases in wages, or benefits, or working conditions; or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL NOT discharge or demote our employees in order to promote their support of a petition to decertify the Union or to encourage them to otherwise withdraw their support for the Union.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective bargaining representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate employees Billy Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnnie Worrell to their former positions prior to our unlawful discrimination against them, or, if those positions are no longer available, to substantially equivalent positions, and **WE WILL** expunge from their personnel records all references to the discharges of Gross, Heist, Hordyk, and Kimbrough, and the demotion of Worrell.

WE WILL make employees Bill Gross, Theresa

Heist, Becky Hordyk, James Kimbrough, and Johnnie Worrell, whole for the loss of wages and benefits, with interest, including any loss of seniority they may have incurred as a result of our unlawful discrimination against them.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529 as their collective bargaining representative or to refrain from doing so.

SEWELL-ALLEN BIG STAR, INC. NO. 2,
d/b/a BIG STAR NO. 187

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

APPENDIX D (attachment of APPENDIX A)

JD—(ATL)—38—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agenc of the UNITED STATES GOVERNMENT

The National Labor Relations board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice and abide by its terms.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any of the other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT fail or refuse to remit dues to the Union in accordance with the terms of our expired labor agreement.

WE WILL NOT engage in interrogation of our employees concerning their union sympathies; union membership, or attendance of union meetings; or sponsor or endorse the circulation of petitions to decertify the Union as the collective bargaining representative of our employees; or solicit our employees to sign said petitions; or promise increases in wages, or benefits, or better working conditions, or greater job security to our employees if they decertify or otherwise abandon their support for the union; or issue threats of discharge, strikes, layoffs, less favorable

working conditions, or hours if the employees continue to support the Union; or issue threats to our employees of the futility of their continued support for the Union because we will not sign a new labor agreement, or will not bargain with the Union or continue to abide by the terms of the expired labor agreement.

WE WILL NOT encourage our employees to bypass the collective bargaining representative and to bring contacts by the Union to the attention of our management.

WE WILL NOT interfere with the rights of handbillers to distribute Union handbills on the sidewalk area in front of our stores.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective bargaining representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529 as their collective bargaining representative or to refrain from doing so.

BAKER BROS., INC., d/b/a BAKERS' BIG STAR STORES NOS. 31, 61, 64, and 81

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174

APPENDIX E (attachment of APPENDIX A)
JD—(ATL)—38—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post and abide by its terms.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrappers.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such

time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any

unilateral changes by us from the terms of the expired agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529 as their collective bargaining representative or to refrain from doing so.

SMF MANAGEMENT, INC., d/b/a
SMF FOOD RITE SUPERMARKETS

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

APPENDIX F (attachment of APPENDIX A)

JD—(ATL)—38—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such

time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any of the other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529 as their collective bargaining representative or to refrain from doing so.

GILBERT ALLEN BIG STAR, INC., d/b/a
BIG STAR NO. 142

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

APPENDIX G (attachment of APPENDIX A)
JD—(ATL)—38—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD an agency of the UNITED STATES GOVERNMENT

The National Labor Relations board has found that we have violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize;
To form, join, or assist unions;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers, AFL-CIO, Local 1529 ("the Union") was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining units. The appropriate bargaining units are:

1. All head meat cutters, journeymen meat cutters, apprentices and wrappers.

2. All employees except meat market and professional employees.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining agreement which expired on October 31, 1982, or in any of the other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT deny reasonable access of Union representatives to our employees in non-customer areas during working hours.

WE WILL NOT unilaterally grant to our employees increases in wages and institute new pension plans, changes in insurance carrier and vacation policies, without duly notifying the Union and bargaining collectively in good faith concerning such proposed changes provided that nothing herein shall require us to rescind any increases in wages or benefits, or the implementation of new benefits which have previously been granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT institute a new grievance procedure or employee hot line or otherwise encourage our employees to bypass the Union as their collective bargaining representative by bringing grievances directly to our management.

WE WILL NOT fail or refuse to remit dues to the Union in accordance with the terms of our expired labor agreement.

WE WILL NOT interrogate our employees concerning their union sentiments; solicit our employees to withdraw from, or otherwise abandon their support of the Union; or solicit our employees to keep us informed concerning the Union's activities; or threaten our employees with layoff or discharge if they engage in a strike against us.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL-CIO, Local 1529 concerning the terms and conditions of employment of our employees in the units described above.

WE WILL, upon request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL make whole the Union for any loss of dues, with interest, it may have incurred as a result of our failure or refusal to remit dues to it pursuant to the expired labor agreement.

WE WILL continue to apply the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529, as their collective bargaining representative or to refrain from doing so.

GIANT FOODS, INC., A SUBSIDIARY OF MALONE & HYDE, INC.

(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Mid-Memphis Tower Building, Suite 800
1407 Union Avenue
P. O. Box 41559
Memphis, Tennessee 38174
Telephone: (901) 521-2687

NO. 91-1268

FILED
JAN 29 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX VOLUME III

Decision of the National Labor Relations Board dated May 31, 1989 - pg. A-176

Order and Opinion of the Court of Appeals dated August 23, 1991 - pg. A-229

Order of the Court of Appeals denying rehearing dated November 1, 1991 - pg. A-243

David P. Jaqua
Kullman, Inman, Bee, Downing & Banta
5100 Poplar, Suite 1410
Memphis, TN 38137
Telephone: (901) 763-1771
Counsel of Record
for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

Page

APPENDIX B - Decision of the National Labor Relations Board dated May 31, 1989 ..... A-176

APPENDIX C - Order and Opinion of the Court of Appeals dated August 23, 1991 ..... A-229

APPENDIX D -Order of the Court of Appeals denying rehearing dated November 1, 1991 .. A-243

APPENDIX B

JD-(ATL)-38-84
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

SEWELL-ALLEN BIG STAR, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, LOCAL NO. 1529

ET AL.

CASES 26-CA-9834
26-CA-9841
26-CA-9877
26-CA-9896
26-CA-9937-1,-2
26-CA-9963-1,-2
26-CA-9989

TABLE OF CONTENTS

Page

Decision 3
Statement of the Case 3
Findings of Fact and Analysis . . . . .

I. The Business and Status of Respondents 5
II. Status of the Labor Organization 7
III. The Appropriate Units 7
IV. The Alleged Unfair Labor Practices 8

A. Background 8
B. The Merger Issue 11
C. Analysis of the Alleged Refusal to Bargain in Violation of Section 8(a)(5) and (1) of the Act with Respect to Withdrawal of Recognition of the Union by the Respondents in November 1982, and Alleged

TABLE OF CONTENTS (continued)

Page

Implementation of Unilateral Changes in Terms and Conditions of Employment 25

1. The validity of the merger 25
2. The 10(b) issue and the Estoppel Issue 26

D. Allegations of Independent Violations Against Sewell-Allen Big Star, Inc. d/b/a Big Star No. 189 and Sewell-Allen Big Star, Inc., No. 2 d/b/a Big Star No. 103 30

1. A Preliminary Issue—the Supervisory Status of Clifford Phillips 30
2. The June 28, 1982, Conversation Between Phillips and Worrell 31
3. The Conversation Between Store Manager Gordon and Worrell 31
4. The July 12, 1982, Meeting 32
5. The Meeting of July 26, 1982 35
6. The Meeting in Late July 1982 between Phillips and Rowley and Shelton 36
7. The Meeting of Sewell and Allen with Meat Department Employees in Store 103 in Early August 1982 37
8. The Mid-August 1982 Meeting of Sewell and Allen with the Employees in the Meat Department at Big Star No. 103 39
9. The Mid-August 1982 Meeting of Sewell and Allen with the Meat Department Employees at Big Star Store No. 189 42
10. The Meeting Between Fortner and Sewell 46
11. The Circulation of the Decertification Petition . 46

a. Analysis 49

12. The Discharge of Part-Time Employees Bill Gros, Theresa Heist, and Becky Hordyk and the Demotion of Johnny Worrell 49

a. Analysis 49

13. The DIscharge of James Kimbrough 52

14. The Alleged Violations of Section 8(a)(5) and (1) of the Act by Reason of the Course of Conduct Engaged in by Sewell-Allen Big Star, Inc., and Sewell-Allen Big Star No. 2 and by Sewell's Big Star, Inc. 53

F. Independent Allegations of Violations of Bakers Bros. Inc., d/b/a Bakers Big Star Stores Nos. 31, 61, 64, and 81 55

1. The Supervisory Status of Employees Mike Hamm, Todd McClellan, Mark McClellan, and John Westmoreland 55

a. The supervisory status of Mike Hamm 55
b. The supervisory status of Todd McClellan . . 58
c. The supervisory status of Mark McClellan . . 59
d. The supervisory status of John Westmoreland 60

2. The Interrogation of Mayfield by Todd McClellan 61
3. The Solicitation of Mayfield to Sign a Decertification Petition in Early to Mid-August 1982 61
4. The Solicitation of Roy Needham to Sign the Decertification Petition 62
5. The Solicitation of Employees Monasco and Floyd for the First Decertification Petition 62
6. The Solicitation of Mason 63
7. The Solicitation of Hamm 63
8. The Solicitation of Robert Travis 64
9. The Interrogation of Mayfield by Westmoreland 64
10. The Interrogation of Mayfield by Al Baker 65
11. The Statements by Al Baker to Employees of Bakers Big Star No. 81 Concerning the Decertification Petition 65
12. The Solicitation of Monasco and Floyd to Sign a Second Decertification Petition 65
13. Additional Comments and Analysis of the Section 8(a((1) Violations, the Circulation of the Decertification Petitions, and its Sponsorship by Bakers Bros., Inc. 66

14. Respondent Baker Bros. Inc.'s Response to Handbilling by Local 1529 on January 19, 1983, at Bakers Big Star No.64 67
15. The Overall Course of Conduct of Baker Bros. Inc. 68

G. Independent Allegations of Violations By Respondents Pic-Pac, Inc., and Giant Foods, Inc., Contemporaneous With and Subsequent to the Withdrawal of Recognition 68

1. The November Meetings of Respondents Giant and Pic-Pac Representatives with their Employees 68
2. The Meeting at Giant Store No. 5 Between Employee Hurdle and Store Manager Bradford 70
3. The Conversation Between Donald Gilmore and Giant Food Store No. 4 Manager Joe Ashe 70
4. The Conversation Between Checker Allie Conard and Pic-Pac Store No. 14's Assistant Manager Noel Knott 71

H. The Unilateral Changes 72

V. The Effects of the Unfair Labor Practices Upon Commerce 72

Conclusions of Law 73
The Remedy 79
Order 81
Appendix A
Appendix B
Appendix C
Appendix D
Appendix E
Appendix F
Appendix G
Appendix H

SJC

294 NLRB NO. 6

D—9580
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

SEWELL-ALLEN BIG STAR, INC.[1] Case 26—CA—9834

BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64, AND 81 Case 26—CA—9841

GILBERT ALLEN BIG STAR, INC., d/b/a BIG STAR NO. 142; SEWELL-ALLEN BIG STAR, INC., 103, 187, AND 189; BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64, and 81 Case 26—CA—9896

SMF MANAGEMENT, INC., d/b/a SMF FOOD RITE SUPERMARKETS Case 26—CA—9989

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL—CIO, LOCAL 1529

---

[1] On August 28, 1985, the Board granted a joint motion to sever filed by the respondents, Pic-Pac Foods, Inc. and Giant Foods, Inc., and the charging party, in Cases 26—CA—9937—1, 26—CA—9963—1, 26—CA—9937—2, and 26—CA—9963—2. Further, as noted by the Judge at fn. 2 of his decision, a complaint filed against an additional respondent, Wadell Bramlett and Lois Tackett d/b/a Bramlett Tackett Big Star No. 30 in Cases 26—CA—9896 and 26—CA—9877 was

DECISION AND ORDER

On May 4, 1984, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the General Counsel, the Charging Party, and the Respondents filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and

---

Footnote 1 continued.

withdrawn and these cases were severed by order of the Regional Director for Region 26. Accordingly, we have deleted references to those cases in the caption, and we make no finding regarding these parties or enter any conclusions of law with respect to them.

294 NLRB NO. 6

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following factual errors of the judge. In sec. IV,A, of his decision, the judge refers to "a series of meetings to be held in February 1983." The correct date is February 1982. In sec. IV,B, the judge refers to letters of April 11, 1982, notifying the Respondents of the merger. The correct date is April 7, 1982. Throughout his decision, the judge refers to the expiration date of the collective-bargaining agreements as October 31, 1982. The correct date is October 30, 1982. In sec. IV,D,8, the judge refers to the testimony of William Garland regarding an incident in which his car tires allegedly were cut in 1981. The record reflects that the incident allegedly occurred in 1961. In sec. IV,D,5, the judge refers to testimony regarding $8 per month in

conclusions as modified below.[3]

1. For the reasons stated below, we adopt the judge's findings that the Respondents violated Section 8(a)(5) and (1) by withdrawing recognition and by refusing to bargain with the Union.

In January 1982,[4] representatives of United Food and Commercial Workers (UFCW) Locals 1529 and 452 agreed to a merger, with Local 1529 to become the surviving merged union.[5] In February, the merger was approved by the membership of Local 452. Nonmembers were excluded from the voting process. On April 1, International Union UFCW approved the merger.

On April 7, Local 1529 informed the Respondents, with whom Local 452 had maintained a collective-bargaining relationship, that Local 452 and Local 1529 "have effected a merger pursuant to the provisions of the [UFCW] Constitution" and that in accordance with a charter of April 1, 1982, Local 1529 "will continue to

---

Footnote 2 continued.

contributions to a pension fund. The amount referred to in the record is $80 per month.

Under the circumstances presented in this case, we find it appropriate to substitute a narrow cease-and-desist order for the broad order recommended by the judge.

[3] On October 8, 1986, the Board granted the Charging Party's motion to withdraw allegations pertaining to the handbilling and access issues discussed at secs. IV,F,14, and IV,H, of the judge's decision. On October 22, 1986, the Board denied the Respondent's motion for reconsideration. We make no findings regarding the judge's discussion of these issues and we have modified the judge's recommended conclusions of law.

[4] All dates are in 1982 unless noted otherwise.

[5] In *Warehouse Groceries Management*, 254 NLRB 252, 256 (1981), enfd. 683 F.2d 418 (11th Cir. 1982), the Board found that UFCW was a continuation of Retail Clerks International Association and Amalgamated Meat Cutters and Butcher Workers of North America and that it succeeded to the representational rights of both unions.

administer the contract and in all respects continue as the collective bargaining representative of the employees covered by the contract." Local 1529 informed the Respondents that the merger was conducted pursuant to a vote of the membership, and that it did not affect the autonomy of the local and was solely an internal union matter. Also attached to the April 7 letter was a notice to the Respondents that all future correspondence concerning dues checkoff and/or money was to be mailed to Local 1529. In May, the Respondents, Sewell's Big Star, Sewell-Allen No. 2, Sewell-Allen, and Baker's Big Star (Baker Bros.), in response to union correspondence, indicated to Local 1529 that "your letter reconfirms the company's information that Meatcutters Local 452 has merged into Local 1529."

Following notification of the merger in April, the Respondents dealt with Local 1529 as the collective-bargaining representative of the employees covered by their respective bargaining agreements. Thus, as the judge found, grievances were processed, health and welfare and pension fund contributions were remitted, dues were deducted and remitted pursuant to contractual checkoff provisions, when present, and some of the Respondents engaged in bargaining with Local 1529 concerning insurance contribution increases that were due in June.

On July 30, Local 1529 requested that the Respondents commence bargaining for agreements to succeed those expiring on October 30, and requested information pertinent to bargaining. In September, several of the Respondents provided portions of the requested information. Thereafter, on October 7 and 13, initial bargaining sessions were conducted between the Respondents and Local 1529. However, on November 8, following expiration of the bargaining agreements, and 7 months after notification of the merger, the Respondents notified Local 1529 that they no longer recognized Local 1529 as the bargaining representative of their employees. The Respondents asserted that the merger between Local 452 and Local 1529

was invalid because nonmembers had been excluded from the voting process.[6]

We agree with the judge that, based on the foregoing circumstances, the Respondents were estopped from challenging the validity of the merger. It is uncontroverted that, in April, the Respondents expressly were notified of the merger and of Local 1529's assertion of representative status. In response, the Respondents continued to deal with Local 1529 over a 7-month period in the identical manner with which they had dealt with Local 452—processing grievances, remitting dues, tendering health and welfare and pension contributions, and negotiating midterm changes in insurance contributions. This entire course of conduct constituted an acceptance of the representative status of Local 1529. Further, Local 1529 relied to its detriment on the Respondents' recognition of its status as bargaining representative because it took no action to reestablish its status during the 7-month period between the notice of the merger and the Respondents' withdrawal of recognition. Accordingly, we find that the Respondents are estopped from contesting the validity of the merger process as a defense to the 8(a)(5) and (1) allegations.[7] *El Torito-La Fiesta Restaurants*, 284 NLRB No. 66 at slip op. 6—7 (June 26, 1987), enfd. mem. in relevant part 852 F.2d 571 (9th Cir. 1988); *Ventura County Star-Free Press*, 279 NLRB 412, 419 (1986); *Knapp-Sherrill Co.*, 263 NLRB 396, 398 (1982), and 268 NLRB 800, 801 fn. 3 (1984).

---

[6] At the hearing, the Respondents raised, in addition to the exclusion of nonmembers, other alleged infirmities in the merger process.

[7] We note that, in any event, the Respondents' reliance on Local 1529's failure to permit nonmembers to vote in the merger process, as a justification for their withdrawal of recognition, lacks merit in light of *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National)*, 475 U.S. 192 (1986), in which the Supreme Court held that nonmember employees need not be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another union.

Further, we agree with the Judge that permitting the Respondents to challenge the majority status of Local 1529 more than 6 months after they had effectively accepted Local 1529 as the proper successor to the representational rights of Local 452 is inconsistent with the policies underlying Section 10(b) of the Act as set forth in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). In *Bryan Mfg.*, the Supreme Court held that the act of entering into a collective-bargaining agreement at a time when the union did not represent a majority of the unit employees could not be challenged as an unfair labor practice on the part of either the union or the employer if the charge were filed more than 6 months after the contract was executed. That same principle should logically apply to any unfair labor practice charge predicated on the unlawful recognition of a union, during the term of a collective-bargaining agreement, where the union was neither essentially the same entity that had negotiated the agreement nor the properly designated majority representative.[8] And just as the policies underlying Section 10(b) would preclude a direct attack, under Section 8(a)(2) and (3) or Section 8(b)(1)(A) and (2), against acceptance of recognition

---

[8] An employer normally is not free, during the term of a collective-bargaining agreement, to withdraw recognition from the union with which it negotiated the agreement. *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982), enfd. 709 F.2d 1517 (9th Cir. 1983). An excception to this rule is made when a union that negotiated the contract has become defunct or when certain forms of union schism occur. See *Yates Industries*, 264 NLRB 1237, 1249 (1982), and cases there cited. Thus, in the present case, the Respondents would have been entirely within their rights to refuse to deal with a union under the collective-bargaining agreement if they had determined that Local 452 no longer existed under its own name and that Local 1529 had not become a successor pursuant to a valid merger. Indeed, if those were the facts, it would have constituted a violation of Sec. 8(a)(2) for the Respondents to recognize Local 1529 if they had no basis for believing that it had obtained majority support within the bargaining unit. As noted above, however, the Respondents recognized Local 1529 as the successor under the agreement, thereby indicating an acceptance of Local 1529's claim to recognition.

demands by a union asserting that it was a proper successor to the contracting union, so those policies are offended by an indirect attack on the validity of the merger process through a defense to a later withdrawal of recognition. It is undisputed that the Respondents were notified of the merger in April and that they did not contest its validity until November 8, 7 months after notification. Under the principles set out above, we find that the Respondents' challenge came too late and therefore cannot be considered as a defense to the 8(a)(5) charge in the present proceeding. See *Joe Costa Trucking*, 238 NLRB 1516, 1517 (1978), enfd. 631 F.2d 604 (9th Cir. 1980); *North Bros. Ford*, 220 NLRB 1021 (1975).[9]

2. We adopt the judge's findings that Respondent Sewell-Allen Big Star, Inc., No. 2, d/b/a Big Star No. 103 (the Respondent) violated Section 8(a)(3) and (1) by discharging employees Bill Gross, Theresa Heist, Becky Hordyk, and James Kimbrough and by demoting employee Johnnie Worrell.

Employees Heist and Hordyk worked as part-time meatwrappers and Gross worked as a part-time meat cutter. As described more fully by the judge, commencing in June 1982, the Respondent, through Owners Lex Sewell and Dan Allen, Store Manager Michael Gordon, and Supervisor Clifford Phillips, engaged in a series of acts violative of Section 8(a)(1), including repeated attempts to solicit employee abandonment of the Union, threats of reprisal for exercising Section 7 rights, promises of benefit, expressions that continued support of the Union would be futile, and coercive interrogations. This course of conduct seeking to oust the Union as bargaining representative included the recruitment by Gordon and Phillips of employee Leroy Dancer to solicit employee signatures on a petition

---

[9] Because we find that the Respondents are barred from contesting the validity of the merger process, we find it unnecessary to consider the propriety of the merger process itself.

repudiating the Union. As an initial inducement, Phillips offered to arrange additional hours of work for Dancer, who, at the time, worked less than a full-time schedule. Thereafter, Gordon showed Dancer a petition Gordon had prepared reading, "[W]e do not want Local 1529 or Local 452 to represent us. We want out." Gordon asked Dancer to circulate the petition and obtain signatures.

On August 25, the Respondent placed Phillips in a bargaining unit position as head meatcutter, resulting in the demotion of employee Worrell from head meatcutter to journeyman meatcutter. That week, Heist, Hordyk, and Gross were discharged. When Dancer expressed doubts to Gordon about whether a majority of employees would sign the petition, Gordon showed Dancer the new work schedule, resulting from the discharges, and said, "[W]ell, I want to show you something—It is even now. These people are no longer with us." Gordon then mentioned Heist, Hordyk, and Gross and told Dancer they had been terminated. Further, with the placement of Phillips in a unit position, Dancer sought the signature of Phillips on the petition, as instructed by Gordon. After Dancer filed the decertification petition with the Board, Gordon complimented him on a job "well done" and rewarded him with the additional hours of work formerly worked by discharged meatcutter Gross.

During the course of the Respondent's efforts to enlist employee support to repudiate the Union, Sewell and Allen held a meeting of meat department employees. They indicated to employees that it was time to decertify the Union, interrogated employees as to whether they were willing to repudiate the Union, expressed an unwillingness to negotiate with the Union, and promised improved benefits without the Union. At this meeting, the Respondent directed certain comments directly to employee Kimbrough. When Sewell asked employees whether they would repudiate the Union, Kimbrough stated openly that he would stay in the Union. Sewell responded by stating "that

means whether you will have a job or not" and "you better think about your wife and children." Sewell also told Kimbrough, "I hate to see you walking the street, come December or January." On January 8, 1983, the Respondent laid off Kimbrough.

The Respondent contends that the discharges of Heist, Hordyk, Gross, and Kimbrough and the demotion of Worrell were attributable solely to economic reasons. It contends that the meat department was overstaffed, that the layoffs of these employees were a continuation of earlier layoffs, that productivity was increased, and that the layoff of Gross was designed to "placate" the Union by permitting it to staff the meat department on the night shift.

Contrary to the contentions of the Respondent, we agree with the judge that the real reason for the discharges, and the demotion of Worrell, was the participation of these employees in union activities, and that the Respondent's stated business justifications do not withstand scrutiny. First, the credited testimony of Dancer establishes that the Respondent was acutely aware that the termination of Heist, Hordyk, and Gross meant that the tally of union supporters and nonsupporters was, in the words of Gordon, "even now" with the termination of these employees. Further, the demotion of Worrell resulted directly from the placement of Clifford Phillips into a unit position, for the express purpose of making Phillips eligible to sign the petition repudiating the Union. Thus, the record shows that the personnel changes in the department were an attempt to alter the ratio of union supporters in comparison to nonsupporters. Additionally, the discharge of Kimbrough followed closely the repeated threats of discharge, directed to Kimbrough, in response to his outspoken union sentiments. Bluntly, the Respondent informed Kimbrough that his views regarding retention of the Union would determine "whether you will have a job or not."

Regarding the Respondent's economic defense, we note that the record does not support the Respondent's contentions that, as part of a plan to reduce manpower, it laid off two employees prior to the discharge of Heist and Hordyk. One of these employees (Gloria Greech) left of her own volition and the other (Chris Phillips) was laid off after Heist and Hordyk. Further, because the record establishes that the Respondent, as a matater of policy, routinely denied the Union's grievances during the time of these alleged unfair labor practices, its assertion that its layoff of Gross was designed to "placate" the Union, in response to a grievance, is unconvincing.

In addition, although the the record shows that the amount of sales in the meat department remained relatively stable and did not decline following the terminations and the consequent reduction in employee hours worked, it does not follow that the terminations would have occurred even absent the employees' union sentiments. The Respondent's proffered defense essentially rests on the notion that because sales did not decline following the elimination of the hours formerly worked by the terminated employees, it has established that the terminations were economically motivated, i.e., part of an effort to do the same work with fewer, more productive employees. We do not agree. This is not a case where a demonstrable decline in sales leads to a reduction in personnel. Here, sales had remained stable at all pertinent times and staffing was maintained for months at the same levels, until the Respondent decided to seek the repudiation of the Union and terminated union adherents, transferring some of the hours they formerly worked to other employees, including the employee enlisted to circulate a decertification petition. In these circumstances, we agree with the judge that the discharges of Heist, Hordyk, Gross, and Kimbrough, and the demotion of Worrell, violated Section 8(a)(3) and (1).

3. We adopt the judge's findings that Respondent

Baker Bros. violated Section 8(a)(1) of the Act by interrogating and threatening employees, promising them benefits if they repudiated the Union,[10] soliciting employees to abandon the Union, and sponsoring the circulation of decertification petitions. As to those acts committed by head meatcutters Hamm, Todd McClellan, and Westmoreland, each of whom, we agree with the judge, was a supervisor within the meaning of Section 2(11) of the Act,[11] Respondent Baker Bros. contends that the conduct is not attributable to it because these individuals were members of the bargaining unit. We disagree.

The Board has long held that conduct engaged in by supervisors who are included in the bargaining unit is attributable to the employer only when there is evidence that the employer encouraged, authorized, or ratified the supervisor's activity or acted in such a manner as to lead employees reasonably to believe that the supervisors were acting for and on behalf of management. *Montgomery Ward & Co.*, 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). Here, even assuming that Hamm, Todd McClellan, and Westmoreland are members of the bargaining unit, the record demonstrates that the Respondent, by virtue of conduct by its owner and president, Al Baker, led employees reasonably to believe that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management.

---

[10] In finding that Al Baker promised employees improved working conditions in violation of Sec. 8(a(1), if they decertified the Union, we do not rely on Baker's comments that employees would not lose any benefits. Rather, we agree with the judge that, in context with his remarks reregarding the decertification effort, Baker's assurance that the Company would operate a lot smoother without the Union was an implied promise of improved working conditions.

[11] As the allegedly unlawful conduct attributable to Mark McClellan is cummulative to the violations found, we find it unnecessary to decide whether Mark McClellan's conduct was attributable to the Respondent.

As the judge found, the three supervisors made numerous statements in connection with the circulation of a decertification petition that were coercive and that, in part, expressed to employees the likely management response to continued union representation. Thus, they told employees, among other things, that Al Baker was not going to sign another union contract, that management would not even negotiate with the Union, that management would reward employees with better wages and benefits if they ousted the Union, and that if employees supported the Union, they would lose their jobs.

Following the solicitation of employees to sign the petition and the accompanying coercive statements, Todd McClellan informed Al Baker of the result of the solicitations. According to Baker, prior to his receipt of formal notification from the Board that a petition had been filed, McClellan told him that "virtually all of our employees" had signed the petition, with one or two exceptions.

Thereafter, Al Baker spoke to the employees at the Respondent's stores. He told the employees that he appreciated their standing up for the Company and for signing the petition, and stated that as soon as he could get rid of all the "interruptions, " the Company would operate a lot smoother. In the presence of Todd McClellan, Baker also told the employees that he understood that an "overwhelming majority" had signed the petition.

In these circumstances, we find that Al Baker led employees reasonably to believe that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management. The three supervisors represented to employees during the decertification effort that management would reward employees for ousting the Union, that Al Baker would not sign a contract or even negotiate with the Union, and that the employees could lose their jobs if they supported the Union. When Baker informed the employees, in the presence of Todd McClellan, that he was

aware that most of them signed the petition, he could reasonably be understood to be privy to an essential detail of the petition's circulation.

By virtue of his conduct at these meetings, urging ouster of the Union, emphasizing the result to be achieved by doing so, and revealing details of the circulation of the petition, Al Baker furthered the reasonable perception that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management when they circulated the petition seeking ouster of the Union, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction. We therefore, on this basis, adopt the judge's findings that Respondent Baker Bros. violated Section 8(a)(1).[12]

Conclusions of Law

1. Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL—CIO, Local 1529 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

---

[12] For the reasons discussed in sec. 1, above, we also adopt the judge's 8(a)(5) and (1) findings as to Respondent Baker Bros.' withdrawal of recognition of the Union, as well as the judge's remaining 8(a)(5) and (1) findings.

4. The following employees of Respondent Sewell-Allen Big Star, Inc., d/b/a Sewell-Allen Big Star No. 189 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

5. The following employees of Respondent Sewell-Allen Big Star, Inc., No. 2 d/b/a Sewell-Allen's Big Star No. 103 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act.

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

6. The following employees of Respondent Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act.

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

7. The following employees of Respondent SMF Management, Inc., d/b/a SMF Food Rite Supermarkets constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrappers.

8. The following employees of Respondent Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

9. Each of the Respondents had knowledge of the merger in April 1982 of United Food and Commercial Workers Locals 1529 and 452 and recognized Local 1529 as the successor of Local 452 and continued to do so until after the expiration of their collective-bargaining agreement(s) with Local 452 on October 30, 1982.

10. About November 8, 1982, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, each withdrew recognition from and refused to bargain with Local 1529 as the collective-bargaining representative of their employees in the above appropriate units.

11. As a result of their voluntary recognition of Local 1529 as the successor to Local 452 as the collective-bargaining representative of their employees and their failure to withdraw recognition from the Union until more than 6 months after they voluntarily recognized Local 1529 in April 1982, each of the Respondents is barred by Section 10(b) of the Act from challenging the representative status of Local 1529 as a defense to the unfair labor practice charges alleging that they unlawfully withdrew recognition from Local 1529.

12. By reason of their delay in withdrawing recognition from Local 1529 until after the expiration of their collective-bargaining agreements with Local 452, each of the Respondents is estopped from withdrawing recognition from Local 1529 by challenging the validity of the merger.

13. Respondents Sewell-Allen Big Star, Inc., d/b/a Big Star No. 189 and Sewell-Allen Big Star, Inc. No. 2, d/b/a Big Star No. 103 are a single employer.

14. By their withdrawal of recognition in November 1982 and continuing refusal to bargain with Local 1529 as

the collective-bargaining representative of their employees in the appropriate units found above, and to furnish information to the Union for bargaining, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc.; SMF Management, Inc.; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 violated Section 8(a)(5) and (1) of the Act.

15. By its June 28, 1982 solicitation of its employee Johnnie Worrell to withdraw as a member of Local 1529 and its promise of improvements in working conditions if he did so, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

16. By its June 30, 1982 solicitation of its employee Worrell to withdraw from the Union; by its promise of improvements in benefits if he did so; and by its issuance of a threat of store closure if the employees did not abandon the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

17. By its July 12, 1982 solicitation of employee Worrell to withdraw from the Union, and by its issuance of an unspecified threat to Worrell regarding his future; by its statement that it would be unable to bargain with Union President Sheppard; by its threat of plant closure if Worrell and the other employees remained in the Union, and by its promises of improvements in wages and benefits if the employees abandoned the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

18. By its July 26, 1982 interrogation of employee Worrell concerning whether he had decided to withdraw from the Union; by its threat of the futility of continued representation by the Union; and by its implied promise of improvements in benefits and other terms and conditions of employment if its employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

19. By its late July 1982 solicitation of employees Thomas Shelton Jr. and Michael Rowley to withdraw from the Union; its promise of improvements in their retirement and insurance benefits if they did so; and its threat of less desirable working hours and loss of employment if they did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a(1) of the Act.

20. By its early August 1982 solicitation of its employees Herbert Bobbitt, James Kimbrough, and Worrell to withdraw from the Union; by its threat of the futility of continued union representation because it would not allow Union President Sheppard in its store; and by its promise of improvements in wages and benefits if the employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

21. By its mid-August 1982 interrogation of its employees Worrell, Kimbrough, Shelton, Rowley, and Mary Armour concerning their support of the Union; by its solicitation of its employees to withdraw from the Union; by its representation to the employees that it would not bargain with or sign a labor agreement with Union President Sheppard, demonstrating the futility of the employees' continued support of the Union; by its promises of improvements in pension benefits if the employees withdrew from the Union; and by its threat of discharge to employee Kimbrough if he did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

22. By its solicitation of its employee, William Garland, in August 1982 to withdraw from the Union and that Garland solicit the withdrawal of its other employees from the Union; by its promise of improvements in benefits if the employees withdrew from the Union; by its subsequent mid-August 1982 interrogation of its employees

Garland, Bobby Thurman, and Jim Perry concerning their sentiments with respect to the circulation of the decertification petition; by its solicitation of said employees to withdraw from the Union; by its promise of improvements in wages and benefits if they withdrew from the Union; by its statement that it would not negotiate with or sign a labor agreement with Union President Sheppard and the Union; and by its threat of a strike by the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

23. By its solicitation of employee Mary Fortner in late August 1982 to bypass her collective-bargaining representative and to bring grievances to the attention of its management, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

24. By its solicitation of its employee Leroy Dancer to withdraw from the Union; by its promise to give him additional working hours if he did so; and by its solicitation and sponsorship of the filing of the decertification petition by Dancer, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

25. By the discharge of its part-time employees Bill Gross, Theresa Heist, and Becky Hordyk; and by its demotion of head meatcutter Johnnie Worrell to journeyman meatcutter in August 1982, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(3) and (1) of the Act.

26. By its discharge of employee James Kimbrough, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(3) and (1) of the Act.

27. By their implementation of unilateral changes in the terms and conditions of employment of their employees following the withdrawal of recognition from Local 1529 by the unilateral granting of wage increases to their employees; by refusing to accept or process grievances filed

by the Union; and by refusing to furnish information to the Union, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; and Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) and (5) of the Act.

28. By their unlawful course of conduct initiated in the summer of 1982 and continuing thereafter, whereby Respondent Sewell-Allen Big Star, Inc. engaged in violations of Section 8(a)(1) and (5) of the Act and Respondent Sewell-Allen Big Star, Inc., No. 2 engaged in violations of Section 8(a)(1), (3), and (5) of the Act, each of the Respondents has engaged in an unlawful course of conduct inconsistent with its obligation to bargain with Local 1529 as the collective-bargaining representative of its employees, and has thereby committed a separate violation of Section 8(a)(5) and (1) of the Act.

29. By its interrogation of its employee William Mayfield in June 1982 concerning whether he was a member of the Union, Respondent Baker Bros., Inc. violated section 8(a)(1) of the Act.

30. By its solicitation of its employee Mayfield in August 1982 to sign a petition to decertify the Union; by its promise to Mayfield of improvements in wages and benefits if the Union were decertified; by its threat of a harmful strike if a decertification petition was delayed; and by its threat that it would not sign another contract with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

31. By its solicitation of its employee Roy Needham to sign a petition to decertify the Union; and by its threat of discharge issued to Needham if he engaged in a strike, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

32. By its solicitation of employees Richard Floyd and Mary Jane Monasco to sign a petition to decertify the

Union; by its promise of improved working conditions if the employees abandoned the Union; and by its statement that it would no longer honor the labor agreement with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of theAct.

33. By its solicitation of its employees Vickie Mason and Patricia Doty to sign the decertification petition; and by its statement to these employees that a new labor agreement would not be signed with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

34. By its solicitation of its employee Randy Inman to sign the decertification petition; and by its statement to Inman that it would be a nonunion company and that the Union was out, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

35. By its solicitation of its employee Robert Travis to sign a decertification petition; by indicating that continued support for the Union would be futile as it would not negotiate with the Union; and by its implied promise of a wage increase if the employees chose to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

36. By its interrogation of employee Mayfield on August 5, 1982, as to whether he had attended a union meeting; by its threat to Mayfield that if he voted for the Union, he would either lose his job or have his working hours reduced; and by its promise of job security if Mayfield voted to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

37. By its interrogation of employee Mayfield concerning his union activities; and its solicitation of Mayfield to bypass his bargaining representative and notify management of contacts by the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

38. By the statements of its president, Al Baker, to the employees of Baker Big Star No. 81 in August 1982, that the Company would run smoother as soon as he could get rid of the interruptions (the Union), Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

39. By its solicitation of employees Monasco and Floyd to sign a second decertification petition, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

40. By its sponsorship and circulation of two petitions to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

41. By its implementation of unilateral changes in the terms and conditions of employment of its employees following the withdrawal of recognition from Local 1529 by the unilateral granting of wage increases; by refusing to accept or process grievances filed by the union; by deducting union dues from its employees and failing to remit them to the Union; and by refusing information to the Union, Respondent Baker Bros., Inc. violated Section 8(a)(5) and (1) of the Act.

42. By its unlawful course of conduct in its attempt to rid itself of the Union, which was inconsistent with its obligation to bargain with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(5) and (1) of the Act.

43. By its implementation of unilateral changes in the terms and conditions of employment of its employees following its withdrawal of recognition from the Union by the granting of wage increases and by refusing to furnish information to the Union, Respondent Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 violated Section 8(a)(5) and (1) of the Act.

44. By its implementation of unilateral changes in the terms and conditions of employment of its employees

following the withdrawal of recognition from the Union by the granting of wage increases; by its refusal to furnish information to the Union; and by its refusal to process grievances, Respondent SMF Management, Inc. violated Section 8(a)(5) and (1) of the Act.

45. The above unfair labor practices have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

In accordance with our findings that the Respondents unlawfully withdrew recognition from Local 1529 following the expiration of their collective-bargaining agreements with Local 452, we shall order the Respondents to rescind their withdrawal of recognition, and make any and all payments that have otherwise been due under the terms of their expired labor agreements, including the payments of union dues to the Union that were unlawfully withheld by certain Respondents. The Board does not require that employees suffer the loss of increases in wages and improvements in benefits which, as here, employers have unlawfully, unilaterally implemented. Accordingly, we shall not require that the increases in wages and improvements or increases in benefits or implementation of new benefits by the Respondents after their withdrawal of recognition be rescinded. *Kendall College*, 228 NLRB 1083 (1977), enfd. 570 F.2d 216 (7th Cir. 1978); *Dura-Vent Corp.*, 257 NLRB 430 (1981); and *Pace Oldsmobile*, 256 NLRB 1001 (1981), enfd. in relevant part 681 F.2d 99 (2d Cir. 1982). All other terms and conditions of the Respondents' bargaining agreements that expired on October 30, 1982, shall be reinstated to the status quo ante until the

Respondents fulfill their obligations by bargaining, on request, with the Union as the collective-bargaining representative of their employees in the appropriate units, and either reach and execute written agreements with the Union or until valid impasses occur. We shall order that the Respondents furnish the information requested by the Union necessary for it to bargain, on request by the Union, within a reasonable period after the request.

We further order that Respondent Sewell-Allen Big Star, Inc., No. 2 rescind the discharge of employees Bill Gross, Theresa Heist, Becky Hordyk, and James Kimbrough and the demotion of employee Johnnie Worrell, and that the Respondent remove from its personnel records all references thereto and make the above-named employees whole with respect to any loss of seniority, earnings, and benefits that they may have incurred but for the Respondent's unlawful actions against them.

All backpay for loss of earnings and benefits suffered by any employees of the Respondents by reason of the Respondents' withdrawal of recognition from the Union and refusal to bargain with the Union, and losses by the Union and/or employees by reason of the Respondents' refusal to remit union dues, as found above, shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970). Backpay for any loss of earnings and benefits suffered by employees Gross, Heist, Hordyk, Kimbrough, and Worrell by reason of the discrimination practiced against them by Respondent Sewell-Allen Big Star, Inc., No. 2 shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest in all instances shall be computed in the manner prescribed in *New Horizons for the Retarded*.[13]

---

[13] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1988 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date

ORDER

The National Labor Relations Board orders that the Respondents, Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain in good faith with United Food and Commercial Workers International Union, AFL-CIO, Local No. 1529.

(b) Failing and refusing to abide by the terms of their expired labor agreements with the Union, until such time as agreements are reached with the Union or impasse is reached.

(c) Failing and refusing to meet and bargain in good faith with the Union.

(d) Instituting changes in the terms of the collective-bargaining agreement that expired on October 30, 1982, or in any other terms and conditions of employment of the employees without bargaining with the Union.

(e) Failing and refusing to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

(f) Unilaterally granting employees wage increases.

Footnote 13 continued.

of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(g) Respondent SMF Management, Inc. shall further cease and desist from refusing to process grievances.

(h) Respondent Baker Bros., Inc. shall further cease and desist from interrogating its employees concerning their union sympathies; soliciting the withdrawal of its employees from the Union; promising increases in wages and benefits, increased job security, and improvements in their terms and conditions of employment if the employees withdraw from the Union; threatening its employees with the futility of continued support of the Union; threatening its employees with loss of jobs, discharge, or adverse changes in their terms and conditions of employment if they continued to support the Union; sponsoring the circulation of petitions among its employees to decertify the Union as their collective-bargaining representative; directing their employees to bypass their collective-bargaining representatives and bring contacts by the Union directly to the attention of management; failing to remit dues to the Union under the terms of the expired labor agreement; refusing to process grievances; and engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(i) Respondents Sewell-Allen Big Star, Inc., No. 189, and Sewell-Allen Big Star, Inc., No. 2, a single employer, shall further cease and desist from interrogating their employees concerning their union sympathies; soliciting their employees to withdraw from the Union or to sign a petition to decertify the Union; sponsoring the circulation of a petition to decertify the Union; promising their employees increases in wages, benefits, working hours, and improvements in their terms and conditions of employment if they sign the decertification petition or abandon the Union as their collective-bargaining representative; telling the employees that the Union will strike; issuing threats of store closure, and statements that it will not bargain with or sign a labor agreement with Union President Sheppard or with the Union; demoting or discharging their

employees in order to further its unlawful sponsorship of the petition to decertify the Union and discharging or demoting employees because the employees oppose the Respondents' unlawful conduct or to otherwise further its attempts to rid itself of the Union; refusing to process grievances; and from engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(j) Respondent Sewell's Big Star, Inc. No. 187, shall further cease and desist from refusing to accept or process grievances filed by the Union.

(k) The Respondents shall not in any like or related manner interfere with, restrain, or coerce their employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, meet and bargain with United Food and Commercial Workers International Union, AFL-CIO, Local No. 1529 concerning the terms and conditions of employment of the employees in the appropriate units.

(b) Furnish to the Union, on request, relevant information in order to enable it to bargain on behalf of its unit employees.

(c) Make the unit employees whole for any loss of wages or benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union and refusal to bargain by Respondents and by reason of any unilateral changes instituted by Respondents in their terms and conditions of employment.

(d) Reinstate the existing terms of their expired

labor agreements until they have bargained in good faith with the Union and have reached new agreement(s) or valid impasse. Nothing here shall require the Respondents to rescind any increases or improvements in wages or benefits or new benefits previously granted.

(e) Respondent Baker Bros., Inc. shall make whole the Union for all loss of dues, with interest, suffered by reason of the Respondent's failure or refusal to remit dues following its withdrawal of recognition from the Union and, thereafter, remit dues in accordance with the terms of its expired labor agreements.

(f) Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc.; SMF Management, Inc.; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, shall process grievances in accordance with the terms of their expired labor agreements.

(g) Respondent Sewell-Allen, Inc., No. 2 shall offer Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnnie Worrell immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, and make the employees whole for all loss of wages and benefits they incurred by reason of the Respondent's unlawful discrimination against them in the manner set forth in the remedy section of the decision and remove from its files all references to the discharges of Gross, Heist, Hordyk, and Kimbrough and to the demotion of Worrell.

(h) All Respondents shall preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay

due under the terms of this Order.

(i) Post at their facilities copies of the attached notices as designated for each Respondent marked "Appendices A through F."[14] Copies of the notices, on forms provided by the Regional Director for Region 26, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Each Respondent shall notify the Regional Director in writing within 20 days from the date of this Order what steps each Respondent has taken to comply.

Dated, Washington, D.C. May 31, 1989

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL'S BIG STAR, INC.,
d/b/a BIG STAR NO. 187

.....

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX B (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrograte our employees concerning their Union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective-bargaining representative; or solicit our employees to circulate or sign a petition with promises of increases in wages or benefits or improved working conditions, or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere

with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local No. 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL'S BIG STAR, INC.,
d/b/a BIG STAR NO. 189

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX C (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrogate our employees concerning their Union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective-bargaining representative; or solicit our employees to circulate or sign a petition with promises of increases in wages or benefits or improved working conditions, or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL not discharge or demote our employees in order to promote their support of a petition to decertify the Union or encourage them to otherwise withdraw their support of the Union.

WE WILL NOT engage in conduct inconsistent with our obligations to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate employees Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnny Worrell to their former positions prior to our unlawful discrimination against them, or, if those positions are no longer available, to substantially equivalent positions, and WE WILL remove from their personal records all references to the discharges of Gross, Heist, Hordyk and Kimbrough, and the demotion of Worrell.

WE WILL make employees Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnny Worrell, whole for the loss of wages and benefits, with interest, inclusing any loss of seniority they may have incurred as a result of our unlawful descrimination against them.

WE WILL reinstate the terms of the expired labor agree-

ment until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL-ALLEN BIG STAR, INC., NO. 2,
d/b/a BIG STAR NO. 103

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX D (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement that expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT fail or refuse to remit dues to the Union in accordance with the terms of our expired labor agreement.

WE WILL NOT engage in interrogation of our employees concerning their union sympathies, union membership, or attendance of union meetings; or sponsor or endorse the circulation of petitions to decertify the Union as the collective-bargaining representative of our employees; or solicit our employees to sign the petitions; or promise increases in wages or benefits or better working conditions or greater job security to our employees if they decertify or otherwise abandon their support for the Union; or issue threats of discharge, strikes, layoffs, less favorable working conditions, or hours if the employees continue to sup-

port the Union; or issue threats to out employees of the futility of their continued support for the Union because we will not sign a new labor agreement, or will not bargain with the Union or continue to abide by the terms of the expired labor agreement.

WE WILL NOT encourage our employees to bypass the collective-bargaining representative and to bring contacts by the Union to the attention of our management.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL make whole the Union for any loss of dues, with interest, it may have incurred as a result of our failure and refusal to remit dues to it pursuant to the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

BAKER BROS. INC., d/b/a
BAKER'S BIG STAR STORES
NOS. 31, 61, 64, AND 81

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX E (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrappers.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SMF MANAGEMENT, INC., d/b/a
SMF FOOD RITE SUPERMARKETS

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX F (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining-agreement that expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

GILBERT ALLEN BIG STAR, INC.,
d/b/a BIG STAR NO. 142

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX C

NOS. 89-5730/5868

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED AUG 23 1991
LEONARD GREEN, Clerk

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64 AND 8I; GILBERT ALLEN BIG STAR, INC., d/b/a BIG STAR NO. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., d/b/a SMF FOOD RITE SUPERMARKETS,	
Petitioners, Cross-Respondents,	ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
V.	
NATIONAL LABOR RELATIONS BOARD,	
Respondent, Cross-Petitioner,	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529, AFL-CIO,	
Intervenor.	

A-230

Decided and Filed _____

Before: **MILBURN** and **NELSON**, Circuit Judges, and **ENGEL**, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. The National Labor Relations Board found that each of the petitioners in this case committed an unfair labor practice by refusing to recognize a local union following the expiration of collective bargaining agreements with the local. The Board rejected an argument that the local did not have to be recognized because it had merged with another union some seven months before the collective bargaining agreements expired. The Board also found that one petitioner had waged an anti-union campaign by discharging and demoting employees for union activities and soliciting employees to sign a decertification petition, and that another petitioner had sponsored a decertification petition through "supervisors" who were in fact members of the bargaining unit. The petitioners seek review of the Board's order, and the Board cross-petitions for enforcement. We shall deny the petition for review and grant the Board's cross-petition for enforcement.

I

The petitioners (or "the companies") independently operate retail grocery stores in the Memphis, Tennessee, area. Prior to January of 1982 the companies' meat department employees were represented by Local 452 of the United Food and Commercial Workers International Union (UFCW). Each unit was covered by a collective bargaining agreement that was scheduled to expire on October 30, 1982.

A.

Local 452 was originally part of the Amalgamated Meat Cutters and Butcher Workers of North America. In

1979 Amalgamated merged with the Retail Clerks International Union to form the UFCW. This merger did not directly affect Local 452. In January of 1982, however, the executive board of Local 452 agreed to merge the local into UFCW Local 1529, formerly a local union of the Retail Clerks International Union. The merger was voted on at bargaining unit meetings held in February. The members of Local 452 approved the merger by a vote of 432 to 72. The UFCW likewise approved the merger, and it became effective on April 1, 1982. All assets of Local 452 were transferred to Local 1529. The president of Local 452, Mike Mancini, became secretary-treasurer of Local 1529; the secretary-treasurer and chief executive officer of Local 452, Bill Lambert, became a consultant to Local 1529. Mancini and several other Local 452 officials moved their offices to those of Local 1529.

On April 7, 1982, Mancini, as "Secretary-Treasurer U.F.C.W. Local 452," sent letters to the companies informing them of the merger. Attached to Mancini's letter was another letter, signed by officials of each local, stating that "with the approval of the memberships, [the locals] have effected a merger" effective April 1, 1982, that the merged unions would operate as Local 1529; and that "the merger in no way affects the autonomy of the Local Union and, in any event, is purely an internal matter having no affect [sic] on the relationship between Local No. 452 and [the company]."

The labor agreements between the union and the companies continued to be administered in the usual way following the merger. Grievances were accepted and processed, union dues were deducted and sent to Local 1529, contributions were made to health and pension funds, and representatives of Sewell-Allen and Baker Brothers met with the union in June to negotiate an increase in health and welfare premiums. As early as May 28 and 31, the attorneys for Baker Brothers and Sewell-Allen acknowledged their understanding that "Local 452 has been merged into

Local 1529."

None of the companies challenged the merger until after the contracts had expired. During a bargaining session with Local 1529 Dan Allen, president and co-owner of Sewell-Allen, asked if nonmembers had voted on the merger (they had not), but neither he nor anyone else connected with the companies took any action before the contract expired.

On September 8 Sewell-Allen Big Star Store 189, acting through its attorney, expressed a willingness to initiate bargaining with Local 1529 at a mutually agreeable time. On November 8, 1982, however, the companies notified the union that they no longer recognized it as their employees' bargaining representative. The stated reason was that nonmember employees had not been allowed to vote on the merger.[1] The companies unilaterally granted wage increases thereafter. SMF, Sewell-Allen, and Baker Borthers refused to process grievances, and Baker Brothers refused to remit to the union dues that had been deducted from employees' pay.

B

On June 28 the meat department supervisor of Sewell-Allen's Big Star Store 103, Clifford Phillips, told an employee, Johnnie Worrell, that Sewell-Allen wanted the employees to get out of the union because of the merger. He added that working conditions would be better without the union. On June 30 store manager Michael Gordon spoke to Worrell about withdrawing from the union. Gordon suggested that the union might force the store to close. On

---

[1] The Supreme Court has since found it permissible to exclude nonmember employees. *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). In proceedings before the Board's administrative law judge the companies also claimed that other procedural defects, such as the lack of a secret ballot, invalidated the vote.

July 12 company co-owners Lex Sewell and Dan Allen made similar representations to Worrell. In early August Sewell and Allen told several other employees that benefits would be better without the union. When one employee, James Kimbrough, asked what would happen if he stayed in the union, either Sewell or Allen replied that his family would be out on the street and he would be out of a job. In November of 1982 Sewell, Allen, and Gordon saw Kimbrough passing out literature soliciting union membership. Kimbrough was discharged the following January, at which time Gordon told him that there was too much help in the meat department.

Phillips offered Leroy Dancer, a part-time meatcutter, more hours if he would circulate a decertification petition. On August 25 Gordon gave Dancer a petition stating "[w]e want out of the Union" and told him how to file it with the NLRB. Gordon also told him, several times, "[n]ow, remember, this is your idea." When Dancer expressed doubt that the company could win a decertification election, Gordon showed Dancer the new work schedule and said: "It is even, even now. These people are no longer with us." Gordon named three workers (Heist, Hordyk, and Gross) who had been discharged the previous week.

Sewell-Allen demoted Phillips from supervisor to head meatcutter, also on August 25, and moved Johnnie Worrell from head meatcutter to Journeyman meatcutter, As head meatcutter, Phillips was a member of the bargaining unit and could therefore sign the decertification petition. On August 27 Phillips summoned each employee on duty into his office to see Dancer, who asked each to sign the petition. Dancer filed the petition with the Board later that day.

The company claims that the discharges of Heist, Hordyk, Gross, and Kimbrough were economically justified. Although the sales volume of Sewell-Allen's meat department remained steady, Sewell-Allen claims that

fewer full-time employees could handle the same workload more efficiently than many part-timers. Also, the workload decreased because in July the store began buying boxed rather than hanging beef; in August it began ordering pre-packaged chickens; and in October it began buying boneless chucks, all of which reduced the amount of meat cutting necessary. Sewell and Allen testified that they were unaware of any union activity by Heist and Hordyk before they were discharged. Sewell and Allen claim that Gross was discharged because he only worked eight hours a week and could not work the night shift where, pursuant to a union grievance, they needed more staffing. As for Kimbrough, they claim that he was discharged not because of pro-union activities but becaue he was the least senior employee at the time. They assert that after the discharges the store was able to maintain the same dollar sales volume with 90 fewer hours per week and no increase in overtime.

C

In July and August of 1982 Mike Hamm, head meatcutter at Baker Brothers Store No. 61, asked several employees to sign a petition to decertify the union. He told other employees that Baker Brothers would not sign a new contract with the union, and he promised better working conditions without the union. At roughly the same time Todd McClellan, head meatcutter at Baker Brothers Store 81, asked three employees to sign a decertification petition. He told two employees that they would make more money without the union, and he warned another that Baker Brothers would not negotiate with the union. In early August John Westmoreland, a "roving" head meatcutter, questioned an employee, Charles Mayfield, about the union and told him that his hours would be cut or he would lose his job if he voted for the union. Hamm, McClellan, and Westmoreland were bargaining unit employees.

Three weeks after Westmoreland questioned Mayfield, Alvin Baker, president and co-owner of Baker

Brothers, approached Mayfield at work. He told Mayfield that Westmoreland had told him that Mayfield had been harassed by someone from the union. Baker told Mayfield to let him or Westmoreland know if it happened again.

After the decertification petition was filed on August 9, Baker met with the meat department employees at each of his stores. He told them that he understood an overwhelming majority of employees had signed the petition and that he appreciated those people who had. He also promised that the company would run "smoother" after they got rid of these "interruptions." Baker says he told the employees that they would not lose pay or benefits regardless of the results of the election.

D

Accepting a recommendation and opinion of the administrative law judge, the Board found that all four companies had violated §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with Local 1529. The Board agreed with the ALJ that the six-month statute of limitations barred any defense based on procedureal defects in the merger vote, and it agreed that the companies were estopped from asserting such a defense because they had treated Local 1529 as the employees' representative after the merger. The Board also found that Sewell-Allen and Baker Brothers committed independent violations of §§ 8(a)(1) and (5) of the Act by sponsoring decertification petitions and encouraging employees to get out of the union. The Board rejected Baker Brothers' argument that it was not responsible for the statements of its head meatcutters. The Board also found that Sewell-Allen's discharges violated §§ 8(a)(1) and (3).

II

A

Section 10(b) of the National Labor Relations Act, 29

U.S.C. § 160(b), prohibits the filing of an unfair labor practice charge with respect to events occurring more than six months before the filing. This six-month limitation period applies as well to defenses based on unfair labor practices. *NLRB v. Marin Operating Inc.*, 822 F.2d 890, 893 (9th Cir. 1987). Section 10(b) also bars a charge based on an unfair labor practice occurring within the six-month period if adjudication of the charge would require determining whether events outside the limitations period also violated the Act. *Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). A company cannot defend its refusal to recognize a union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the union. *Joe Costa Trucking Co.*, 238 N.L.R.B. 1516, 1517, 1521-22 (1979), *enf'd sub nom. NLRB v. Edjo, Inc.*, 631 F.2d 604 (9th Cir. 1980). See also *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021 (1975) (company could not challenge union's status as lawful successor to the previous union because company had recognized the union more than six months earlier). We see no reason not to follow these decisions here.

Although an employer is not usually free during the term of a collective bargaining agreement to withdraw recognition from the union with which it negotiated by agreement, *Abbey Medical/Abbey Rents, Inc.*, 264 N.L.R.B. 969 (1982), *enf'd*, 709 F.2d 1514 (9th Cir. 1983), recognition may be withdrawn if the union becomes defunct or a schism occurs. *Yates Industries, Inc.*, 264 N.L.R.B. 1237, 1249 (1982). A merger of two local affiliates of the same international union does not automatically relieve the employer of the obligation to bargain with the successor union, but deficiencies in the voting process could affect a company's obligation. *Id.* at 1249. The Board observed in the present case that the companies would have been "entirely within their rights" to refuse to deal with the union had they determined that Local 1529 was not a successor pursuant to a valid merger. But the com-

panies concede that they received prompt notice of the merger and did not question it. We agree with the Board that the notice of merger was unambiguous.

B

We also accept the Board's conclusion that the companies are estopped from challenging the merger because they continued to deal normally with the new local until the contracts expired. In June of 1982 Sewell-Allen and Baker Brothers bargained with Local 1529 over an increase in insurance payments. Although SMF and Gilbert Allen did not engage in such brgaining, none of the petitoners questioned Local 1529's status when Leon Sheppard, chief executive officer of Local 1529, wrote to each in July concerning bargaining for a new contract. SMF and Gilbert Allen provided some of the information Sheppard requested, and Sewell-Allen Big Star Store 189 expressed willingness to begin negotiations. All of the petitioners also continued to remit dues in the usual manner.

Citing *Knapp-Sherril Co.*, 263 N.L.R.B. 396 (1982), the Board found that by this conduct the companies recognized Local 1529, and that such recognition barred them from subsequently challenging the validity of the merger. In *Knapp* the Board held that the employer waived its right to challenge the procedures employed in a merger between two locals where it had notice of the merger, where it treated the new local as its employees' bargaining representative, and where the union relied on the employer's apparent acquiescence in the merger by taking no steps to reestablish its majority status. In the case at bar, as in *Knapp*, the companies were informed of the merger very shortly after it became effective, and they treated the merged entity as their employees' bargaining representative. Local 1529 took no action to reestablish its majority status during the term of the contract. Now that the contract has expired, however, the companies have "disrupted the bargaining relationship at a time when [the

local's] role as bargaining representative is most vital to the employees: at the commencement of negotiations for a new collective-bargaining agreement." *Id.* at 398. As in *Knapp*, the companies "had but to question initially the merger procedures rather than recognize Local [1529]." *Id.* The companies are estopped from questioning the merger procedure now.

NLRB v. Canton Sign Co., 457 F.2d 832 (6th Cir. 1972), is not to the contrary. In that case the predecessor union was never certified as the bargaining representative of the company's employees, and no union members worked for the company when it withdrew recognition. *Id.* at 839, see also *Knapp*, 263N.L.R.B. at 398 n.5.

III

The Board determined that Sewell-Allen violated the Act by waging an anti-union campaign. The Board's findings of fact must be accepted if they are supported by substantial evidence in the record taken as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

It is an unfair labor practice for an employer to threaten retaliation or to promise benefits based on employees' support for or opposition to the union. *NLRB v. E.I.DuPont de Nemours*, 750 F.2d 524, 527-28 (6th Cir. 1984). Kimbrough testified that Sewell and Allen threatened that he would be out of a job if he supported the union. Dancer testified that store manager Gordon and supervisor Phillips had him circulate a decertification petiton and promised him more hours for completing the task. It is an unfair labor practice for an employer to sponsor or participate in the circulation of a decertification petition. *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1299 (6th Cir. 1988). Dancer testified that he was given the petition, that he was told whose names should appear first and last, and that Gordon provided him with the address of the local NLRB office. The evidence also indicates that Sewell,

Allen, Gordon, and Phillips repeatedly solicited employees to withdraw support from the union, which they ought not to have done. See *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

Substantial evidence also supports the Board's finding that Sewell-Allen violated §§ 8(a)(1) and (3) by discharging workers because of union activity. Such conduct clearly violates the Act. *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 240 (6th Cir. 1983). Unlawful motivation may be inferred from demonstrated hostility to the union, the timing of the discharges, and the implausibility of proffered reasons for them. *DuPont*, 750 F.2d at 529; *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987). Hostility to the union can be seen in the decertification drive. The timing of the discharges, just before the decertification petition was filed, is suspicious. As for the proffered reason for the discharges, Sewell-Allen contends that it had only operated Store 103 for a short time and that it was still making adjustments. It notes that the discharges of Heist, Hordyk, and Gross occurred at the end of the fiscal year, and it cites changes in the form in which it purchased meat, which reduced the amount of meatcutting necessary. However, the Board showed that several discharges did not reduce the hours worked but merely shifted hours between employees. The evidence also showed that sales per hours worked actually decreased slightly after Heist, Hordyk, and Gross were released. There is also direct evidence of anti-union motive. Gordon boasted to Dancer that after the discharges of Heist, Hordyk, and Gross, the numbers of employees in favor of and opposed to the union were equal. The company gives no explanation for the timing of Kimbrough's discharge, except that it became apparent to them that he was no longer needed. This explanation is suspect, given that he was told several months earlier that if he supported the union he would be out on the street in January or February.

IV

Whether Baker Brothers conducted an anti-union campaign is not quite as clearcut. Only statements and conduct attributable to the employer may constitute an unfair labor practice. *NLRB v. Schroeder,* 729 F.2d 967, 970 (3d Cir. 1984). The Board's finding that Baker Brothers had violated § 8(a)(1) was based for the most part not on the conduct of upper management,[2] as in the case of Sewell-Allen, but on the conduct of Baker Brothers' head meatcutters, who were members of the bargaining unit. The issue here is whether the activities of Baker Brothers' head meatcutters in interrogating employees and sponsoring a decertification drive are attributable to Baker Brothers.

We must first determine whether the head meatcutters were supervisors. The National Labor Relations Act defines a supervisor as:

> "[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

Because the definition is written in the disjunctive, an employee is a supervisor if he performs any of the listed activities, as long as the authority requires independent judgment. *NLRB v. Lauren Mfg. Co.,* 712 F.2d 245, 247 (6th Cir. 1983). The courts have also recognized secondary indicia

---

[2] Baker Brothers does not seriously challenge the Board's finding of an independent violation of § 8(a)(1) based on Al Baker's interrogation of employee Mayfield, and substantial evidence supports the finding.

of supervisor status, such as co-workers' perceptions that the person is a supervisor or the small amount of time devoted to the type of work performed by bargaining unit employees. *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). Each of the three meatcutters in question meets some of these criteria. Hamm directed the work of others, interviewed applicants and effectively recommended that they be hired. He disciplined employees, he was considered by co-workers as the manager of the meat department, and he spent only a quarter of his time cutting meat. McClellan directed the work of others, assigned and approved overtime and vacations, and was considered the manager of the department by his co-workers. Westmoreland was able to discipline co-workers. The Board's determination that the head meatcutters are supervisors thus has support in the record and a reasonable basis in law. *See Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1099 (6th Cir. 1981).

Nevertheless, the conduct of the supervisors may be attributed to the employer only if "the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for or on behalf of management." *Montgomery Ward & Co.*, 115 N.L.R.B. 645, 647 (1956), *enf'd*, 242 F.2d 497 (2d Cir.), *cert. denied*, 355 U.S. 829 (1957). Accord, *Connecticut Distributors, Inc. v. NLRB*, 681 F.2d 127, 129 (2d Cir. 1982). See also *Schroeder*, 726 F.2d at 971 (noting that the majority of courts of appeals addressing the issue "have predicated the employer's liability for threats by a supervisor on whether the employee hearing them would have just cause to believe that the supervisor was acting for and on behalf of the employer"); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 347 (8th Cir. 1986).

Al Baker, by his comments to employees at each of his stores after the decertification petition was filed, ratified the head meatcutters' activities. he placed his

imprimatur on the decertification drive by thanking those who signed the petition "for the confidence" they placed in him. His statement that things would run more smoothly after the matter was resolved could be taken, as the Board took it, as an implied promise of better conditions without the union despite Baker's assurance that the employees would not lose benefits regardless of the vote. Baker's questioning of one employee regarding union "harassment," based on reports he received from McClellan, also supports the inference that McClellan and the others acted with Baker's approval. Baker also admitted telling the employees that he understood an overwelming majority of employees had signed the petition. Baker learned this from McClellan. McClellan, not surprisingly, attended the meeting at Store 81, where he was head meatcutter. McClellan's anti-union activities and the content of Baker's remarks suggest that McClellan acted with the approval of management.

V

After this case was submitted, the petitioners filed a motion for leave to file a supplemental brief, pursuant to Rule 28(c), Fed. R. Ap. P., in order to discuss three recent appellate cases: *Texas Petrochemicals v. NLRB*, 923 F.2d 398 (5th Cir. 1991); *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21 (8th Cir. 1991); and *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372 (2d Cir. 1990). These authorities do not alter our conclusion that the petitioners' defense of an invalid merger is barred and that the petitioners committed unfair labor practices.

Accordingly, the motion for leave to file a supplemental brief is **DENIED**, the employers' joint petition for review of the Board's order is **DENIED**, and the Board's cross-petition for enforcement of its order is **GRANTED**.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 1 1991
LEONARD GREEN, Clerk

SEWELL-ALLEN BIG STAR, INC., ET AL.,	)	
Petitioners/Cross-Respondents,	)	
v.	)	ORDER
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/ Cross-Petitioner,	)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529, AFL-CIO, (UFCW, LOCAL 1529),	)	
Intervenor	)	

BEFORE: MILBURN and NELSON, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

No. 91-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS., INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., Nos. 103, 187 AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529, AFL-CIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529's BRIEF IN OPPOSITION

LYNN AGEE
(Counsel of Record)
DEBORAH GODWIN
AGEE, ALLEN, GODWIN, MORRIS & LAURENZI
263 Court, Second Floor
Memphis, Tennessee 38103
(901) 528-1702

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	5
I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION OF LAW	5
II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE COURT DOES NOT HAVE TO REACH THE QUESTION OF THE APPLICABILITY OF § 10(b) OF THE NATIONAL LABOR RELATIONS ACT, AND FURTHER THE COURT OF APPEALS' APPLICATION OF § 10(b) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT	7
III. THE PETITION FOR CERTIORARI SHOULD BE DENIED ON THE "RATIFICATION" ISSUE SINCE IT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND WILL NOT IN ANY WAY EFFECT THE OUTCOME OF THIS ACTION	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129 (1946) 8
Amoco Production Co., 262 NLRB 1240, 110 LRRM 1419 (1982) 2
Fiberboard Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964) 6
Joe Costa Trucking Co., 238 NLRB 1516 (1979), *enf'd sub nom.* 8
Knapp-Sherril Co., 263 NLRB 396 (1982) 7
Local Lodge No. 1423 Int'l Ass'n of Machinist v. NLRB (Bryan Mfg. Co.), 362 U.S. 411 (1960) .. 8
Montgomery Ward, 115 NLRB 645 (1956), *enf'd*, 242 F.2d 497 (2nd Cir.), *cert. denied*, 355 U.S. 829 (1957) 9
NLRB v. 7-Up Bottling Co., 344 U.S. 344, 61 LRRM 2237 (1953) 6
NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1990) .. 8
NLRB v. Electric Cleaner Co., 315 U.S. 685, 10 LRRM 501 (1942) 6
NLRB v. Food and Commercial Workers Local 1182 (Seattle-First National Bank), 475 U.S. 192 (1986) 2, 6
NLRB v. J.H. Rutter-Rex Mfg. Co., 369 U.S. 258, 116 LRRM 2289 (1969) 6
NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) 6, 7
North Bros. Ford, Inc., 220 NLRB 1021 (1975) 8
Somerville v. U.S., 376 U.S. 909 (1964) 7, 8
Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991) 5, 7

STATUTES

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. § 154(a)(1) 2, 3
§ 8(a)(3), 29 U.S.C. § 154(a)(3) 3
§ 8(a)(5), 29 U.S.C. § 154(a)(5) 2, 3
§ 10(b), 29 U.S.C. § 160(b) 3, 4, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1263

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS., INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187 AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529, AFL-CIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION 1529's BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

United Food and Commercial Workers Local 1529, respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

This case involves the coordinated effort of Petitioners Sewell-Allen Big Star, Inc., Baker Bros., Inc., Gilbert Allen Big Star, Inc., Sewell-Allen Big Star, Inc., Nos. 103, 187, and 189, and SMF Management, Inc., (hereinafter "the Companies") to undermine the majority status of the Union, United Food and Commercial Workers Local 1529, AFL-CIO (hereinafter "Local 1529" or "the Union").

The Union originally filed charges alleging violations of §§ 8(a)(5) and (1) of the National Labor Relations Act. 29 U.S.C. § 154 et seq., (hereinafter "the Act"), against each of the Petitioner retail grocery stores for their withdrawal of recognition from and refusal to bargain with Local 1529 follow the expiration of its collective bargaining agreements with Petitioners on October 30, 1982.

Locals 1529 and 452 of the United Food and Commercial Workers International Union merged effective April 1, 1982. Local 1529 notified each of the Petitioners by letter of April 7, 1982 of this merger and of Local 1529's status as representative of the employees formerly represented by Local 452. All Petitioners continued to deal with Local 1529 as before the merger without raising any questions or objections concerning the merger election.

The decision of the Petitioners to withdraw recognition on the basis that the merger was improper was not made until after the Board's decision in *Amoco Production Co.*, 262 NLRB 1240, 110 LRRM 1419 (1982) (that nonmembers must be allowed to vote in an affiliation vote), and at the critical time of contract negotiations for new labor agreements. This Court subsequently held in *NLRB v. Food and Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986), that nonmember employees need *not* be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another Union.

Additional violations of §§ 8(a)(5) and (1) of the Act including numerous unilateral changes relating to the refusal to bargain were alleged against all of the Petitioners; independent violations of §§ 8(a)(1)(3) and (5) of the Act were alleged against Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81, and Sewell-Allen Big Star, Inc.

Following a hearing, Administrative Law Judge (ALJ) Lawrence W. Cullen found that the Petitioners' withdrawal of recognition and refusal to bargain constituted unfair labor practices in violation of the Act. He further held that Petitioners Sewell-Allen Big Star, Inc., Sewell-Allen Big Star, Inc., No. 2, and Baker Bros., Inc., committed numerous violations of the Act including unilateral changes, discharges and demotions and disregarded the rights of their employees. (A-144). The ALJ further held that Petitioners were precluded from protesting the validity of the merger because of their voluntary recognition of Local 1529 as the successor of Local 452 and their failure to withdraw recognition from the Union until more than six (6) months after voluntary recognition in April of 1982. (A-47-53, A-134). Petitioners were further held to be barred from asserting their defense by the six (6) month statute of limitations of § 10 (b) of the Act. (A-134).

The National Labor Relations Board (hereinafter "Board") issued its Decision and Order on May 31, 1989, adopting the decision of the ALJ in its entirety although modifying the Order recommended by the ALJ. (A-176).

The Sixth Circuit Court of Appeals agreed with the Board that the Union's notice of merger to the Companies was unambiguous and that the Companies were therefore "estopped from challenging the merger because they continued to deal normally with the new Local until the contracts expired." (A-237). The Court noted that Sewell-Allen and Baker Bros. bargained with Local 1529 over an increase in insurance payments, and that all

of the Petitioners continued to remit dues in the usual manner. The Court further agreed with the Board that § 10(b) of the Act prohibited the Company from refusing to recognize the Union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the Union. (A-236). The Sixth Circuit further upheld the Board's findings that Sewell-Allen waged an anti-union campaign including soliciting decertification petitions and discharging workers because of their Union activities. The Court also upheld the Board's finding that Baker Bros. was responsible for the statements of its head meat cutters in sponsoring decertification petitions and encouraging employees to get out of the Union. (A-235; A-242). All the Companies were represented and advised to withdraw recognition by the same attorneys. (A-52-53).

Petitioners' statement at footnote 5 on page 4 of its Petition that there has "been no contact with the Union for all these years" is untrue. Moreover, there is no evidence in the record to support this contention and any lack of contact of which Petitioners would have knowledge was occasioned by the Petitioners' unlawful unilateral changes and perpetuation of its unfair labor practices including its refusal to recognize and bargain with Local 1529. (A-129).

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION OF LAW.

The Sixth Circuit's rejection of Board delay as a basis for overturning the Board's decision and bargaining order in this case does not create a conflict amongst the circuits and does not invoke an important federal law question. The Sixth Circuit Court of Appeals considered Petitioners' reliance on Board delay and cases citing Board delay and determined that it did "not alter the conclusion that Petitioners' defense of an invalid merger is barred and that the Petitioners committed unfair labor practices." (A-242).

This is not a case enforcing a bargaining order issued in the context of a lost union representation election. Rather, this case arises in the context of a concerted and protracted anti-union campaign to deny employees their incumbent Union representation. The Sixth Circuit Court of Appeals determined that delay was not a determinative factor based on the unique circumstances before it.

Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991), relied upon by the Companies, involved a *successor's* withdrawal of recognition of the incumbent union based on a questionable polling procedure. The Court, in denying enforcement of the Board's bargaining order, cited an *unsolicited* employee petition rejecting Union representation, as well as the completely unexplained Board delay from the Administrative Law Judge's Order in 1982 to the Board's Order in 1989 as the basis for determining on balance that an election would be the best method of determining employee choice. These circumstances are plainly distinguishable from those at hand as the previous discussion demonstrates. Further, while

the Board had this case under consideration this Court decided *NLRB v. Food and Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986) resolving the issue of whether non-member employees need to be afforded the opportunity to vote on a merger of two (2) unions. The Court's decision that non-member employees need *not* be afforded such opportunity to vote resolved one of the primary issues in the case at hand and accounts for at least part of the delay between the ALJ's decision in June of 1984 and the Board's decision in 1989.

This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 216, 57 LRRM 2609 (1964). The Board's remedies are "for the board to wield not for the courts." *NLRB v. 7-Up Bottling Co.*, 344 U.S. 344, 61 LRRM 2237 (1953). The purpose of a remedial order is to put the parties back to the extent possible to the status quo ante. The Board is not required to place the consequences of its own delays, even if inordinate, upon wronged employees to the benefit of wrong doing employers. *NLRB v. Electric Cleaner Co.*, 315 U.S. 685, 698, 10 LRRM 501 (1942); *NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962).

In *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 116 LRRM 2289 (1969), this Court held that the Court of Appeals had exceed the narrow scope of review provided for the Board's remedial orders when it shifted the cost of Board delay from the company to the employees. Here, the employees have been denied effective representation as a result of the Companies' unlawful refusal to recognize and bargain with the Union, unilateral charges, discharges, demotions, solicitation of decertification petitions and continued protracted litigation. To use the current status of Union representation to relieve the Companies of the bargaining order would only reward the

Companies' unlawful practices. As the Fifth Circuit recognized in *Texas Petrochemicals, supra*, relied upon by the Petitioners here, "an obstinate employer may not benefit from its own wrongs." 923 F.2d at 404. While Board delay has been considered by certain courts of appeals as a factor to balance in considering whether or not to uphold an NLRB bargaining order, this does not create a conflict amongst the circuits nor an important federal question which has not been but should be decided by this Court. *NLRB v. Katz, supra* (bargaining order enforced notwithstanding assertion that Board order issued three years after refusal to bargain). The Court of Appeals considered Board delay here and rejected it on balance as a determining factor in upholding the Board's remedial bargaining order.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE COURT DOES NOT HAVE TO REACH THE QUESTION OF THE APPLICABILITY OF § 10(b) OF THE NATIONAL LABOR RELATIONS ACT, AND FURTHER THE COURT OF APPEALS' APPLICATION OF § 10(b) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Where the resolution of a conflict or constitutional issue is irrelevant to the ultimate outcome of the case, certiorari may be denied. *Somerville v. U.S.*, 376 U.S. 909 (1964). In the case at hand, it is not necessary for the Court to reach the question of applicability of the § 10(b) of the Act limitations period since the Court of Appeals, relying on *Knapp-Sherril Co.*, 263 NLRB 396 (1982), also held that the Companies were estopped from challenging the merger because they continued to deal normally with the new local until the contracts expired. Since the defense proffered by the Petitioners, i.e. invalidity of the merger would be precluded by either the § 10(b) limitations period or estoppel, the result, affirmance of the decision of the Board, would not change. In

Somerville v. U.S., *supra*, certiorari was denied where it was evidenced that the resolution of the conflict would not change the result reached below because the petitioner would be liable under either federal or state law. *See also, Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946) (Court refused to decide the constitutional validity of a federal statute, which had been a critical issue below, because of the presence of non-constitutional issues which might alone have served as an adequate ground for disposition of the case).

Assuming, arguendo, that the Court reaches the issue of the applicability of the § 10(b) limitations period, the Sixth Circuit panel's opinion presents no conflict with this Court's decision in *Local Lodge No. 1423 Int'l Ass'n of Machinist v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). A company cannot defend its refusal to recognize a union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the union. *Joe Costa Trucking Co.*, 238 NLRB 1516, 1517 (1979), *enf'd sub nom; NLRB v. Edjo, Inc.*, 631 F.2d 604 (9th Cir. 1990). *See also, North Bros. Ford, Inc.*, 220 NLRB 1021 (1975).

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED ON THE "RATIFICATION" ISSUE SINCE IT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND WILL NOT IN ANY WAY EFFECT THE OUTCOME OF THIS ACTION.

The Petitioners contend that Baker Bros. President, Al Baker's ratification of three (3) supervisors' circulation of the decertification petition which took place after the signings cannot constitute ratification. This contention misses the point. As the panel noted, the fact that Al Baker learned of the signings from Supervisor McClellan and had interrogated another employee based on reports from McClellan "supports the inference that McClellan

and the [other supervisors] acted with Baker's approval." Thus, the Sixth Circuit's application of the *Montgomery Ward* test to this case is a proper application of law to fact and does not raise an important question of federal law which has not been but should be decided by this Court. 115 NLRB 645, 647 (1956), *enf'd*, 242 F.2d 497 (2nd Cir.), *cert. denied*, 355 U.S. 829 (1957). Further, this issue would not effect the ultimate outcome of the case and is tangential at best.

CONCLUSION

A Petition for Certiorari will be granted only when there are special and important reasons therefore. Rule 10, Supreme Court Rules. Such circumstances are not present here as previously discussed and therefore Respondent United Food and Commercial Workers Local 1529, AFL-CIO, prays that the Petition for Writ of Certiorari be denied and that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

LYNN AGEE
(Counsel of Record)
DEBORAH GODWIN
AGEE, ALLEN, GODWIN, MORRIS
& LAURENZI
263 Court, Second Floor
Memphis, Tennessee 38103
(901) 528-1702

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-1263

In the Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel
D. RANDALL FRYE
Acting Deputy General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably exercised its discretion in ordering petitioners to bargain with the union despite the passage of time and employee turnover that occurred while petitioners were litigating their obligation to bargain.

2. Whether the Board correctly ruled that petitioners violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with a successor union after its merger with the incumbent union.

3. Whether the Board properly attributed to petitioner Baker Bros. the antiunion conduct of its supervisors in finding that Baker Bros. violated Section 8(a)(1) of the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Continental Web Press, Inc. v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984)	7
El Torito-La Fiesta Restaurants, 284 N.L.R.B. 518 (1987), enforced mem., 852 F.2d 571 (9th Cir. 1988)	4
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	8
Franks Bros. v. *NLRB*, 321 U.S. 702 (1944)	6-7
International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276 (1975)	6
Knapp-Sherrill Co.:	
263 N.L.R.B. 396 (1982)	4
268 N.L.R.B. 800 (1984)	4
Local Lodge No. 1424 v. *NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960)	9, 10
Montgomery Ward & Co., 115 N.L.R.B. 645 (1956), enforced, 242 F.2d 497 (2d Cir.), cert. denied, 355 U.S. 829 (1957)	11
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990)	8
NLRB v. *District 30, United Mine Workers*, 422 F.2d 115 (6th Cir. 1969), cert. denied, 398 U.S. 959 (1970)	10
NLRB v. *Katz*, 369 U.S. 736 (1962)	6, 7
NLRB v. *Schroeder*, 726 F.2d 967 (3d Cir. 1984)	11
NLRB v. *Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972)	10

Cases—Continued: Page

Texas Petrochemicals Corp. v. *NLRB*, 923 F.2d 398 (5th Cir. 1991) 7
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 12
Ventura County Star-Free Press, 279 N.L.R.B. 412 (1986) 4
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 6

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 5
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3
§ 10(b), 29 U.S.C. 160(b) 4, 5, 8, 9, 10, 11
§ 10(e), 29 U.S.C. 160(e) 6
29 C.F.R. 102.48(d)(1) 6

Miscellaneous:

Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992: Hearings Before a Subcomm. of the House Comm. on Appropriations, 102d Cong., 1st Sess. Pt. 7 (1991) 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1263

SEWELL-ALLEN BIG STAR, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A229-A242) is unreported, but the judgment is noted at 943 F.2d 52 (Table). The decision and order of the National Labor Relations Board (Board) (Pet. App. A180-A228), including the recommended decision of the administrative law judge (ALJ) (Pet. App. A1-A150), is reported at 294 N.L.R.B. 312.

JURISDICTION

The decision of the court of appeals was filed on August 23, 1991. A petition for rehearing and rehearing en banc was denied on November 1, 1991.

Pet. App. A243-A244. The petition for a writ of certiorari was filed on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Sewell-Allen Big Star, Inc., Baker Bros., Inc., Gilbert Allen Big Star, Inc., and SMF Management, Inc., each operate one or more retail grocery stores in the Memphis, Tennessee, area. Prior to 1982, petitioners' meat department employees were represented by United Food and Commercial Workers International Union Local 452 (Local 452). Each bargaining unit was covered by a collective bargaining agreement which was to expire on October 30, 1982. Pet. App. A230.

In January 1982, officials of incumbent Local 452 agreed to merge Local 452 into United Food and Commercial Workers International Union Local 1529 (Local 1529 or Union). Pet. App. A231. The membership of Local 452 voted to approve the merger, which became effective on April 1, 1982. *Ibid.* Nonmembers were excluded from voting on the merger. *Id.* at A182.

On April 7, 1982, Local 1529 notified each petitioner in writing that the Local 452 membership had approved the merger, and that Local 1529 would function as the representative of bargaining-unit employees. Pet. App. A182-A183. Following this notification, petitioners voluntarily recognized Local 1529 as the successor to Local 452. *Id.* at A194. Petitioners continued to process grievances, to make employee benefit fund contributions, and to remit union dues. *Id.* at A183.

During the summer of 1982, however, three supervisors employed by Baker Bros. began circulating a

decertification petition against the Union. As part of their campaign to oust the Union, these supervisors, who were members of the bargaining unit, told employees that Al Baker, owner and president of Baker Bros., would not sign a new contract with Local 1529, that management would reward them with better wages and benefits if they ousted Local 1529, and that those employees who supported the Union would lose their jobs. *Id.* at A191. After the decertification petition was filed with the Board, Al Baker thanked the employees for their support and stated that the company would run more smoothly once he had gotten rid of all the "interruptions." *Ibid.*

Petitioners and Local 1529 conducted initial bargaining sessions for new labor contracts in early October 1982. On November 8, 1982, however, after the collective-bargaining agreements had expired, petitioners notified Local 1529 that they no longer recognized it as the lawful bargaining representative of their employees, claiming that the April 1982 merger was invalid because nonmembers of Local 452 had not been permitted to vote. *Id.* at A183-A184. Petitioners refused to bargain further with the Union, and proceeded to implement unilateral changes in terms and conditions of employment. *Id.* at A200-A201.

2. The ALJ found (Pet. App. A1-A144) that petitioners' withdrawal of recognition from and refusal to bargain with Local 1529 violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). The ALJ also found that Baker Bros.' anti-union tactics constituted independent violations of Section 8(a)(1) of the Act.

The Board affirmed. Pet. App. A180-A228. The Board found that petitioners had "continued to deal with Local 1529 over a 7-month period in the iden-

tical manner with which they had dealt with Local 452." Pet. App. A184. This course of conduct, in the Board's view, "constituted an acceptance of the representative status of Local 1529." *Ibid.* Additionally, the Board found that Local 1529 relied to its detriment on petitioners' recognition of its status as bargaining representative "because it took no action to reestablish its status during the 7-month period between the notice of the merger and [petitioners'] withdrawal of recognition." *Ibid.* Relying on well-settled law,[1] the Board concluded that petitioners were estopped from raising the validity of the merger as a defense to the Section 8(a)(5) and (1) charges. *Ibid.* The Board also agreed with the ALJ that the policies underlying Section 10(b) of the Act[2] barred petitioners from challenging the majority status of Local 1529 because their challenge came more than six months after they had accepted Local 1529 as the successor to Local 452. *Id.* at A185.

The Board also affirmed the ALJ's determination that Baker Bros. committed independent unfair labor practices. In particular, the Board found that the anti-union conduct of the Baker Bros. supervisors in fostering decertification efforts was properly attributable to Baker Bros., because Al Baker "furthered

---

[1] *El Torito-La Fiesta Restaurants*, 284 N.L.R.B. 518, 519-520 (1987), enforced mem. in relevant part, 852 F.2d 571 (9th Cir. 1988); *Ventura County Star-Free Press*, 279 N.L.R.B. 412, 419 (1986); *Knapp-Sherrill Co.*, 263 N.L.R.B. 396, 398 (1982), and 268 N.L.R.B. 800, 801 n.3 (1984).

[2] Section 10(b), 29 U.S.C. 160(b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

the reasonable perception that [the supervisors] were acting for and on behalf of management when they circulated the [decertification] petition * * *, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction." *Id.* at A192.[3]

The Board ordered petitioners to "bargain[], on request, with the Union as the collective-bargaining representative of their employees in the appropriate units." Pet. App. A202.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A229-A242. The court agreed with the Board that Section 10(b) barred petitioners' challenge to the validity of the merger because petitioners had failed to challenge the merger within six months after they received "unambiguous" notice thereof. Pet. App. A235-A237. The court also agreed that petitioners were estopped from challenging the merger because they had recognized and dealt normally with the Union until after the contracts expired, thus causing the Union to rely on petitioners' recognition of its status. *Id.* at A237-A238.

The court also upheld the Board's finding that the conduct of the Baker Bros. supervisors was properly attributable to Baker Bros. for purposes of Section 8(a)(1). Pet. App. A240-A242. The court found

---

[3] The Board also found that Al Baker violated Section 8(a)(1) by promising employees improved working conditions if they would decertify Local 1529 (Pet. App. A190 n.10, A200), and by interrogating an employee concerning his union activities (*id.* at A240 n.2, A199), and that Baker Bros. also committed other Section 8(a)(1) violations (Pet. App. A198-A200). In addition, the Board found that petitioner Sewell-Allen Big Star, Inc. committed various acts of anti-union conduct in violation of Section 8(a)(1). *Id.* at A195-A198. Petitioners do not seek review of those rulings.

both that Al Baker ratified the supervisors' activities and that other evidence "supports the inference that [the supervisors] acted with Baker's approval." *Id.* at A242.

ARGUMENT

1. Petitioners assert (Pet. 5-10) that enforcement of the Board's order requiring them to bargain with Local 1529 would be inappropriate because of what petitioners characterize as the Board's "gross delay" in rendering its decision. This claim is not properly presented, and in any event lacks merit.

a. Petitioners did not raise this claim before the Board.[4] Since petitioners have pointed to no "extraordinary circumstances" that would excuse their failure to exhaust their administrative remedies, the courts lack jurisdiction to consider their claim. See Section 10(e), 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

b. In any event, there is no merit to petitioners' contention that the Board's delay precludes enforcement of its order. Petitioners assert (Pet. 6) that "there is little or no reason to suppose the Union has majority support after so great a length of time," but this Court has held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain. See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros.* v. *NLRB*, 321 U.S. 702, 703-706

---

[4] Such a claim could have been raised before the Board via a motion for reconsideration, rehearing, or reopening of the record. See 29 C.F.R. 102.48(d)(1).

(1944). While noting that "[i]nordinate delay in any case is regrettable," the Court has rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order, even when the employees have subsequently repudiated the union. *Katz*, 369 U.S. at 748 n.16.

Nor are petitioners correct in asserting (Pet. 5-7) that the decision of the court below creates a conflict among the circuits. In both *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991), and *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984), the courts exercised their equitable discretion to deny enforcement of the Board's bargaining orders based in part on the Board's delay. In both cases, however, the courts relied on factors in addition to administrative delay to justify their decision, including in particular the existence of persuasive evidence that the unions involved had lost majority status.[5] Petitioners presented no such evi-

---

[5] In *Texas Petrochemicals*, for example, the employees submitted unsolicited petitions showing that a majority of members of the bargaining unit no longer wanted union representation; the court referred to the petitions as "significant facts which must be considered by this court." 923 F.2d at 405. In denying enforcement of the bargaining order, moreover, the court made clear that the mere fact of Board delay was not the sole basis for its decision, which was instead based on "all of the facts in th[e] record." *Id.* at 406. Similarly, in *Continental Web Press*, an employee petition circulated during the period of litigation delay showed that 59 of the 72 members of the bargaining unit no longer wanted union representation. 742 F.2d at 1094. As the court stated, "[a]ll of these things considered, the probability that the union still has the support of a majority of the [employees] is small." *Id.* at 1095. The court accordingly indicated that it would not enforce a bargaining order. *Ibid.*

dence in this case, and thus *Texas Petrochemicals* and *Continental Web Press* are inapposite.[6]

Finally, there is no merit to petitioners' contention that review by this Court is warranted because "gross Board delay * * * continues to be a recurrent problem." Pet. 9. The problem of Board delay has recently been substantially mitigated and is unlikely to recur.[7] Accordingly, review is not warranted.

2. Petitioners assert (Pet. 10-11) that the Board and the court of appeals erred in applying the policies underlying Section 10(b) to bar their challenge to the validity of the merger of Locals 1529 and 452. This contention does not merit review.

First, Section 10(b) was only an alternative ground for the rejection of petitioners' challenge to the merger. The Board also found, and the court of appeals agreed, that petitioners were estopped from

---

[6] Petitioners offered no evidence that the Union now lacks majority support; instead they merely assert that "the vast majority of the present meat market employees were not even employed in 1982." Pet. 5. The mere change in personnel does not, of course, suffice to rebut the normal presumption of majority union support. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987); see also *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (employer not entitled to indulge presumption that striker replacements for union members oppose the union).

[7] The Board has implemented the recommendations of the General Accounting Office that it put into place a time limit for each decision stage as well as for final issuance of decisions. Moreover, the Board has reduced its backlog from 1,679 unfair labor practice and representation cases in February 1984 to 523 cases in January 1991. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

questioning the validity of the merger by virtue of their earlier conduct ratifying the merger and the Union's reliance thereon. Petitioners do not challenge that finding, which is dispositive of their claim. Thus, review of the Section 10(b) issue by this Court could not change the outcome of the case.

Second, the Board's ruling that the policies underlying Section 10(b) barred petitioners' attack on the merger was correct, and does not conflict with *Local Lodge No. 1424* v. *NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960). In *Bryan Mfg.* this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying the Section 10(b) limitations period preclude converting "what is otherwise legal into something illegal." 362 U.S. at 419.[8] Accordingly, the Court held that a contract, lawful on its face, could not be found to be unlawful because it was entered into with a minority union, where the charge of illegality was filed more than six months after the contract was executed.

As the Board explained, the policies identified in *Bryan Mfg.* would clearly preclude an untimely unfair labor practice complaint challenging the validity

---

[8] According to the Court, the policies underlying Section 10(b) are "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' " and "to stabilize existing bargaining relationships." 362 U.S. at 419.

of an employer's recognition of a successor union. Pet. App. A185. Those same policies would equally be "offended by an indirect attack on the validity of the merger process through a defense to a later withdrawal of recognition." *Id.* at A186. Petitioners did not contest the validity of the merger—and thereby Local 1529's majority status—until November 1982, seven months after they were first notified of the merger and had accepted Local 1529 as the representative of their employees. Under the principles of *Bryan Mfg.*, petitioners' challenge to Local 1529's status was barred by the policies underlying Section 10(b).

There is no merit to petitioners' contention (Pet. 10) that the Board's application of Section 10(b) is erroneous because that provision is "simply a statute of limitations regulating the General Counsel's prosecution of unfair labor practice matters." In order to fully effectuate the policies underlying Section 10(b), the Board and the courts have applied it to bar the assertion of stale unfair practice claims by employers and unions as a defense to other charges. See, *e.g.*, *NLRB* v. *Tragniew, Inc.*, 470 F.2d 669, 672-673 (9th Cir. 1972) (barring evidence of union's loss of certification election as defense to charge of refusal to bargain); *NLRB* v. *District 30, United Mine Workers*, 422 F.2d 115, 120-122 (6th Cir. 1969), cert. denied, 398 U.S. 959 (1970). Petitioners point to no contrary authority.

Petitioners also suggest (Pet. 10) that the decision below conflicts with *Bryan Mfg.*'s statement that Section 10(b) does not bar the use of evidence of earlier events "to shed light on the true character of matters occurring within the [six month] limitations period." 362 U.S. at 416-417. Petitioners did not seek to "shed

light" on anything that happened within six months of their withdrawal of recognition, however. Instead, they sought to justify their action by showing that the merger election, which occurred outside the six-month period, was unlawful. Thus, petitioners attempted to use stale evidence to "cloak with illegality" events that occurred outside the limitations period and which could not, therefore, have been made the subject of an unfair labor practice complaint. *Id.* at 417. The policy of Section 10(b) forbids such an indirect challenge to the validity of the merger.

3. Baker Bros. claims (Pet. 11-12) that the Board erred in attributing to it the anti-union conduct of three supervisors who were also members of the bargaining unit. This fact-bound claim does not merit review.

Under *Montgomery Ward & Co.*, 115 N.L.R.B. 645 (1956), enforced, 242 F.2d 497 (2d Cir.), cert. denied, 355 U.S. 829 (1957), conduct engaged in by a supervisor who is a member of the bargaining unit is attributable to the employer where there is evidence that the employer "encouraged, authorized, or ratified the supervisor's activities or acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for or on behalf of management." 115 N.L.R.B. at 647. The central inquiry is whether the employee hearing a supervisor's threats would have just cause to believe that the supervisor was acting for and on behalf of the employer. *NLRB v. Schroeder*, 726 F.2d 967, 971 (3d Cir. 1984). The Board found that the supervisors told employees that Al Baker would not sign a new contract with the Union, that management would not negotiate with the Union, that management would reward employees with better wages and benefits if they ousted the

Union, and that if employees supported the Union they would lose their jobs. Pet. App. A191.[9] In addition, the Board found that after the decertification petition was filed Al Baker told employees that he appreciated their support and that as soon as he could "get rid of all the 'interruptions' " the company would "operate a lot smoother." *Ibid.* On these facts, it was entirely proper for the Board to conclude that "Al Baker furthered the reasonable perception that [the supervisors] were acting for and on behalf of management when they circulated the petition seeking ouster of the Union, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction." *Id.* at A192.

Baker Bros. mischaracterizes the Board's finding as a determination that Al Baker "ratified" the supervisors' conduct after the decertification petition had been filed and that this "ratification" retroactively "tainted" the petition. Pet. 4, 12. As is plain from the Board's analysis, the Board actually found that the bargaining unit employees reasonably believed the supervisors to be acting for and on behalf of Baker Bros. *at the time* they circulated the decertification petition.[10] Al Baker's comments after the petition was filed served merely to bolster that reasonable belief. The Board's factual findings,

---

[9] These findings belie petitioners' suggestion that the decertification petition was "lawfully circulated" and that employees "exercise[d] * * * free choice in signing the petition." Pet. 12; see also Pet. 2 n.2.

[10] The court of appeals seems to have relied in part on a ratification theory, see Pet. App. A241, but it also agreed with the Board that the evidence "support[ed] the inference that [the supervisors] acted with Baker's approval." *Id.* at A242.

which were sustained by the court below (Pet. App. A241-A242), are supported by substantial evidence, and thus present no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45402